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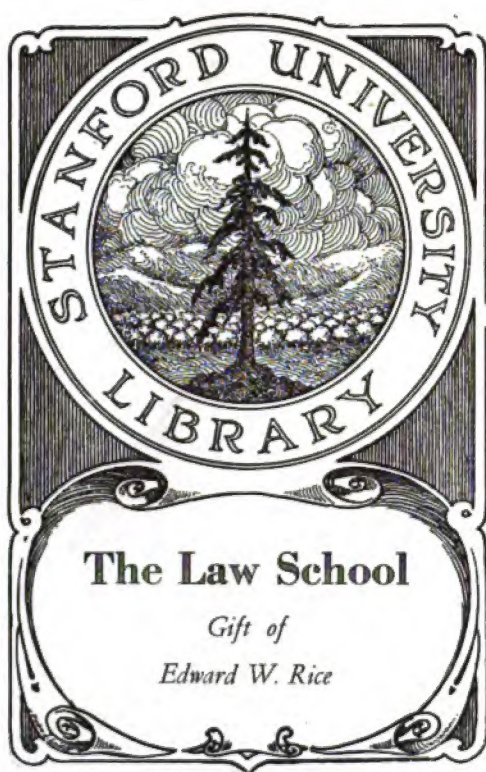
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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE

SIR WILLIAM PAGE WOOD, KNT.,
VICE-CHANCELLOR.

By EDWARD E. KAY AND HENRY R. VAUGHAN JOHNSON,
OF LINCOLN'S INN, ESQUIRES, BARRISTERS-AT-LAW.

VOL. III.

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Pages 428 to 433, for Cower read Cohen.

REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT., VICE-CHANCELLOR:

COMMENCING IN

MICHAELMAS TERM, 20 VICT. 1856.

1856.

LOVETT v. LOVETT.

Nov. 4th.

THE Plaintiffs claimed to be entitled to large real estates, late of *Elizabeth Lovett*, deceased, as devisees under a will executed by the deceased in October, 1853, and a codicil executed by her in June, 1855, and purporting to devise the estates to one of the Plaintiffs for life, with remainder to the other in tail.

Jurisdiction—Will—Bill to establish a—Issue devised vel non—Bill of Peace—Evidence.

The Defendants, the *Lovetts*, were devisees of the same estates, under a will executed by the testatrix in March, 1851, and purporting to devise the same estates to the elder Defendant, for life, with remainder to the younger (an infant) in tail. In the Ecclesiastical Court, the elder Defendant had disputed the will and codicil of October, 1853,

This Court can entertain a suit to establish a will against parties claiming under a prior will, and disputing the Plaintiff's claim: a devisee being entitled to have the will established and his

title quieted not only against the heir, but against all persons setting up adverse rights.

But whether the Court can establish a will against a devisee claiming under another instrument, without directing an issue, (except where an issue would be merely frivolous and vexatious)—*Quære*.

Observations on the impropriety, in such cases, of detailed evidence on the part of the defence.

1856.
 Lovett
 v.
 Lovett.
 Statement.

and June, 1855, as having been executed by the testatrix when of unsound mind.

The Plaintiffs insisted, that, even if the last-mentioned will and codicil were, for any reason, inoperative (which they denied), the will of March, 1851, was revoked by a will executed by the testatrix in May, 1853, and purporting to devise the same estates to the Plaintiffs, but subject to considerable legacies.

The heirs-at-law of the testatrix were also Defendants to the bill.

The bill prayed, that the will and codicil of October, 1853, and June, 1855, might be established; and, if necessary, for an issue to ascertain the validity, or invalidity, of the devises in the last-mentioned will and codicil; or for determining which of the several instruments above mentioned constituted the last will of the testatrix.

Evidence was adduced, on the part of the Defendants *Lovett*, to shew that there was, at least, a question to be tried in reference to the validity or invalidity of the will and codicil under which the Plaintiffs claimed.

Argument.

Mr. *G. L. Russell*, in the absence of Mr. *Rolt*, Q. C., now moved for a decree, in conformity with the prayer of the bill.

Mr. *James*, Q. C., and Mr. *Jessel*, for the Defendants *Lovett*:—

As against the *Lovetts*, the bill should be dismissed, with costs. They are mere devisees, and, as against devisees, the Court has no jurisdiction to establish a will. In *Boyse v. Rossborough* (a), the suit was against the heir. This is against mere strangers, neither of whom has done anything to disturb the Plaintiffs' possession, at least of the real

(a) *Kay*, 71; *S. C.*, affirmed on appeal, 3 De G., M'N. & G. 817.

estate. It is in effect a bill of peace, seeking a perpetual injunction against apprehended claims; and, if it lies, a devisee may maintain suits for quieting his title against all the world. One of the Defendants is an infant, entitled only in remainder; against him, at least, the bill must be dismissed.

1856.
LOVETT
v.
LOVETT.
Argument.

But if the bill is not dismissed, the Defendants are at all events entitled to an issue, their evidence shewing that there is clearly a question to be tried.

Mr. *Hetherington*, for one of the heirs-at-law, declined to ask for an issue.

Mr. *Willcock*, Mr. *Prendergast*, Mr. *Horsey*, and Mr. *Field*, for legatees under the will of October, 1853.

Mr. *Bentinck* for a trustee.

The VICE-CHANCELLOR directed the reply to be confined to the second point made for the defence, being satisfied that, consistently with *Boyse v. Rossborough*, he could not refuse to entertain the bill.

Mr. *G. L. Russell* in reply:—

The Defendants are devisees, and, as such, are not entitled, as of right, to an issue. The question is in the discretion of the Court: *Boyse v. Colclough* (a); and since the evidence they have adduced does not make out a case for an issue, the Court, in the exercise of its discretion, will refuse to grant it.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

As regards the first question, whether the Court has jurisdiction to entertain a suit like the present, or whether

Judgment.

(a) 1 Kay & J. 124.

1856.
 LOVETT
 v.
 LOVETT.
 Judgment.

the bill ought not to be dismissed altogether, it seems to me, that, following the case of *Boyse v. Rossborough*,—as I am bound in consistency to do, so long as that case remains law,—I cannot say that this suit should not be entertained; because the principle of *Boyse v. Rossborough* went to this extent, that a party claiming under any will is entitled to have that will established, not only against the heir, but against all persons who set up adverse rights, and to have his title quieted in that respect. Here, the Defendants, the *Lovetts*, set up an adverse title under a prior will; and it appears to me, that the Plaintiffs will be entitled to have their will established, in the event of the Court arriving at a judicial conclusion, that it is right and proper, on the evidence, that it should be so established.

As regards the next question, whether the Court can establish this will against a devisee claiming under another instrument, without having the validity of the Plaintiffs' will tried in the ordinary mode, by a jury at law—I confess that the proposition, that I could so establish it, struck me at the opening as a prodigiously strong one.

It was argued, and it is laid down by many authorities, that the heir-at-law may claim an issue as of right, but that a devisee cannot. But the application of that rule has uniformly been to the case of a devisee claiming under a will, who, seeking to set up that will, is not entitled, as of right, to an issue, in case the heir-at-law, on cross-examination or otherwise, has shaken the evidence; and the Court may, if it thinks fit, decide the case against the Plaintiff devisee, and dismiss his bill, without directing an issue, or giving him a more favourable opportunity of making out his case at law.

Looking to the observations of Lord *Eldon*, in several cases, in reference to the extent of jurisdiction exercised by

this Court as to wills of real estate, and the doubts he has thrown out as to the Court having jurisdiction to establish wills except through the medium of the verdict of a jury, it appears to me very questionable—in this case it is not necessary to decide the point—whether any authority could be found in which one will has been established against another will, without a trial at law being first had.

1856.
LOVETT
v.
LOVETT.
—
Judgment.

However, I am not now called upon to lay down as a rule, that a party merely standing on a will has a right to put a Plaintiff, seeking to have another will established, to the inconvenience and expense of trying his right, and trying the sanity of the testator, without shewing a shadow of ground for it; because there is in this case sufficient *prima facie* evidence (I am not saying a word on its strength or its weakness) that these Defendants intend *bonâ fide* to contest the point, and that they are anxious to have a decision through the medium of a jury, which they have a right to have, on my being satisfied of the *bona fides* of their wishing for an issue, and that there is a question to be tried.

[The VICE-CHANCELLOR then recapitulated so much of the evidence, adduced by the Defendants, as led the Court to the conclusion that there was a question to be tried, and proceeded:—]

I will make one observation as to the alleged paucity of evidence. I think the Defendants are to be commended (and I said the same in the case of *Hopwood v. The Earl of Derby* (a), when observations were made about evidence not being brought forward,) for not going into much detail of evidence, when it is perfectly clear that this Court will not, except in a case beyond all possibility of doubt, and where nothing but vexation can ensue, refuse to a party the trial of a case at law.

(a) 1 K. & J. 255.

1856.
 LOVETT
 v.
 LOVETT.
 Judgment.

When a case arises,—and I do not think that any such case can be found in the books,—in which the Court sees it would be merely frivolous and vexatious to direct an issue, it may be time enough to determine the extent of the jurisdiction. I do not come to the conclusion that the present case is one of that description. In this case, I must say, that there is sufficient upon the evidence before me to satisfy me, that there is a question to be tried. That is all I have to do in the matter.

Minute of
 Decree.

ISSUE devisavit vel non as to the will of October, 1853, the codicil of June, 1855, and the will of May, 1853.

Nov. 4th.

NOCKOLDS v. LOCKE.

Will—Con-
 struction—
Per Stirpes—
Per Capita.

A SPECIAL CASE

A direction in a will for trustees to apply the whole, or so much as they should think necessary, of the income of property, until the period of distribution, towards the maintenance, education, and advancement of testator's grandchildren *per stirpes*:—
Held, not to afford ground for presuming that he intended a division *per stirpes* of the capital.

A testator, by his will, directed his trustees to stand possessed of his residuary personal estate, upon trust, in the case of each of his three daughters, *Ann*, *Elizabeth*, and *Mary*, to pay one-third of the interest to such daughter for her life; and, after her death, upon trust to pay and apply such one-third, or so much thereof as they should think necessary, in such manner as they should think proper, towards the maintenance, education, and advancement in life of all and every the child and children of such daughter, as well then born as thereafter to be born, until the decease of the survivor of his three daughters.

He then proceeded to bequeath as follows:—"And from and immediately after the decease of the longest liver of them my said daughters, then, as to the whole of the principal moneys so to be placed out as aforesaid, and the

stocks, funds, and securities thereof, and all such interest and dividends as may happen to be due thereon, and unapplied as aforesaid, upon trust, to pay, assign, transfer, and divide the same unto and amongst all and every the child and children of them my said daughters, as well now born as hereafter to be born, in equal shares and proportions; and I give and bequeath the same accordingly."

1856.
 NOCKOLDS
 v.
 LOCKE.
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The testator died in 1821, leaving twelve grandchildren, seven by his daughter *Ann*, four by *Mary*, and one by *Elizabeth*.

Mary died in 1827, *Ann* in 1835, and *Elizabeth* in 1855.

The question for the opinion of the Court was, whether, upon the death of *Elizabeth*, the testator's residuary personal estate became divisible among the grandchildren per stirpes, or per capita.

Mr. *Currey*, for the only child of *Elizabeth*, contended, that the property was divisible per stirpes, and that his client was entitled to one-third, and not merely to one-twelfth. It was true, that the gift of the capital was in terms which, taken alone, would require a distribution per capita; but the cases shewed, that this mode of construction would "yield to a very faint glimpse of a different intention in the context" of the will (a). And here, there was evidence of such intention in the circumstance, that the annual income of each daughter's share was directed, after her death, and until the distribution of the capital, to be applied towards the maintenance, education, and advancement in life of her child or children. In *Brett v. Hor-*

Argument.

(a) Jarman on Wills, vol. 2, p. 162.

1856.
 NOCKOLDS
 v.
 LOCKE.
 Judgment.

maintenance, education, and advancement in life, it appears from the will, that, previously to the period fixed for distribution, the testator does not give the whole of the income of any share for the benefit of any particular family, but only so much of that income as the trustees may think necessary. The result, therefore, of the entire will is this: that the whole of the income is not disposed of until the death of the surviving daughter. No child of any of the daughters could insist on receiving anything, whether principal or interest "unapplied as aforesaid," until that event.

Now, in all the cases which were cited in favour of a division per stirpes, with the exception of *Brett v. Horton*, and especially in the case of *Hunt v. Dorset*, the will contained expressions which pointed, in the opinion of the Court, to a division per stirpes. Here, I find no such expressions.

Then, with regard to *Brett v. Horton*, the reasoning which was founded on that case does not apply. If, upon the death of each of his daughters, the testator had directed the whole of the income of her share to be applied, until the period of distribution, for the benefit of her children, then the reasoning founded upon *Brett v. Horton* would apply. But, here, he has not given the whole. He has given the whole, *or so much of the income as should be thought necessary by the trustees*—evidently intending that the trustees should exercise a discretion as to the amount to be applied for the maintenance, education, and advancement of the children of each family—and it is not until after the death of his surviving daughter that he disposes of the unapplied portion of that income.

This being so, and the gift over of the capital and of the interest "unapplied as aforesaid" being in terms which, taken

alone, would clearly have required a division per capita, I cannot hold that the previous direction to the trustees to apply per stirpes the whole, or so much as they should think necessary, of the income of the property, until the distribution of the capital, affords ground for presuming that he intended a division per stirpes of the capital.

1856.
NOCKOLDS
v.
LOCKE.
Judgment.

Besides, as it was well put by Mr. *Sweet* in the argument, if the testator intended a division per stirpes of the capital, why did he postpone the division of the fund till the death of his surviving daughter? Why did he not leave the children of each daughter, upon her death and their coming of age and becoming competent to give receipts, at liberty to claim their third part of the fund?

I must, therefore, hold that, upon the death of the testator's daughter *Elizabeth*, his residuary personal estate became divisible among the grandchildren per capita; and I have the satisfaction of believing that this was, most probably, the intention of the testator.

Decree accordingly.

1856.

Nov. 13th.

M'CULLOCH v. GREGORY.

*Vendor and
Purchaser—
Title—Proving
Will.*

A purchaser of real property, the title to which is derived under a will, is not entitled to have the will established, or to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will.

THIS cause now came on upon objections to the certificate of the Chief Clerk, finding that a good title was made to property purchased under a decree. The title was derived under the will of one *John Thompson*, who died in 1843. On *Thompson's* death, three sheets of paper, purporting to be his will, and dated the 5th of March, 1843, were offered for probate in the Prerogative Court, and opposed by the late Mr. *Barnard Gregory*, as the sole executor under a former will, dated in the previous month of February. The will of March, which was an extraordinary document both in appearance and language, is partly stated in a former report of this case, upon another point, in 1 Kay & J. 287.

The devise, which, it has recently been held by the Court, conferred on the three *M'Cullochs* estates tail, was followed by gifts of legacies and annuities contained in the second sheet of the will, on which there were a variety of obliterations, alterations, interlineations, and erasures. The third sheet was signed by the testator, and attested by the witnesses in pencil.

The *M'Cullochs* were not originally parties to the suit in the Ecclesiastical Court, but the suit was carried on between *Barnard Gregory* on the one hand, and Mrs. *Le Bas* on the other, who, as sole next of kin of the testator, claimed to be entitled to letters of administration with the will of March annexed, there being no executors appointed by that will.

Mrs. *Le Bas* also claimed to be heiress-at-law of the testator.

In June, 1846, the Judge of the Prerogative Court de-

cided in favour of the will of March, as contained in the three sheets of paper(a); and against this decision Mr. *Gregory* presented his petition of appeal to the Privy Council. Pending these proceedings in the Ecclesiastical Court, Mr. *Gregory* and Mrs. *Le Bas* intermarried; whereupon their interests became united, and the *M'Cullochs* were called upon to "intervene" in the suit, which they did: and they also filed a bill in this Court, to protect the personal estate during the litigation; to have it declared, so far as the real estate was concerned, which was the last will of *John Thompson*; and to have such will established, and the trusts thereof carried into execution. Before any decree was pronounced, a compromise was entered into by articles of agreement between the parties, by the terms of which Mr. and Mrs. *Gregory* were to pay the *M'Cullochs* 15,000*l.*, in consideration of their releasing and conveying all their estate and interest under the will; the 15,000*l.*, until paid, to remain a charge on all the real and personal estates of the testator. Some delay having arisen in payment, further proceedings were taken by the *M'Cullochs* to realise their charge; and, ultimately, a sale of the estate was directed by a decree of this Court in 1852.

1856.
 M'CULLOCH
 v.
 GREGORY.
 Statement.

On the delivery of the abstracts, the present purchaser insisted upon his right to call upon Mrs. *Gregory* for strict proof as to her heirship; and, upon evidence of this being furnished, objected that it was deficient. The Chief Clerk considered him entitled to the proof, and that the evidence adduced was sufficient, and that a good title was shewn.

The purchaser, persisting in his objection, now brought the matter before the Court for decision.

(a) See *Gann v. Gregory*, 3 De G., M.N. & G. 777.

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 —
Argument.

Mr. Willcock, Q. C., and Mr. Batten, for the purchaser.

Mr. Rolt, Q. C., and Mr. W. P. Murray, for the parties having the conduct of the sale, urged, that the purchaser was not entitled to put the vendors to proof of heirship at all. The purchase was strictly of property derived under the will; and it would be introducing a mischievous and inconvenient practice, if a purchaser were to be at liberty to insist on every will being established against the heir. The cases in which it had been done, at the instance of a purchaser, were cases where there had been actual litigation by the heir, or notice given to the purchaser of intended litigation: *Grove v. Bastard* (a), *Green v. Pulsford* (b), *Sugden's Vendors & Purchasers*, as cited in the judgment in *Boyse v. Rossborough* (c). Here, there was nothing of the kind. The litigation in the Ecclesiastical Court was between the legatees under two different wills, and not a dispute by next of kin; and the fact of a will, made since 1838, being admitted to probate, was always considered a sufficient proof by conveyancers of its having been duly executed and attested. The case here was much stronger, because it had been admitted to probate after careful investigation; and the purchaser had, therefore, no ground for his contention.

Mr. Willcock, Q. C., in reply, argued, that the agreement itself, on the face of it, shewed a dealing by the parties claiming under the will with the heir, and it was essential, therefore, that her title as heir should be proved. The will, too, was in itself of so extraordinary a nature, that a purchaser might well be excused for wishing to have all chance of future litigation removed, and his title put on a clear and satisfactory footing.

(a) 2 Ph. 619; S. C., 1 De G., M'N. & G. 69.

(b) 2 Beav. 70.

(c) Kay, 109, 110.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It is quite clear, notwithstanding *Grove v. Bastard* (a), that a purchaser is not entitled in all cases, where there is no suspicion cast upon the will, to have the concurrence of the heir in the conveyance to him, or to have the will established. Here, the only ground of dispute is occasioned by the setting up of a will later than that relied on by Mr. Gregory.

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 Judgment.

All parties in the agreement treated the will of March, 1843, as valid. *Barnard Gregory* withdrew his claim under the other will; and there has never been any dispute concerning its validity, except the question whether the earlier will was revoked by this as a later will. *Barnard Gregory*, who denied this, withdrew from the contest. There has been no attempt, on the part of the heir-at-law or next of kin, to set aside this will; and I should be obliged, in every possible case, to hold that a purchaser could have a will proved, or demand the concurrence of the testator's heir in the conveyance to him, if I so decided here. That would be a most mischievous doctrine. *Grove v. Bastard* (a), was a case in which such a degree of suspicion had been created, that, seeing there was a reasonable ground for disputing the will, it having been prepared by a solicitor in his own favour, and having been disputed, the Court thought the purchaser was entitled to have it established. In this case, I do not see any such ground for doubting the validity of the will. The dispute here on a former occasion was, whether the will conferred such an interest on the vendors as would enable them to convey. That point was decided in their favour. No question has been raised impeaching the validity of the instrument itself. *Barnard Gregory*, if he ever disputed it, had withdrawn from the contention; and so far from there being a probability of such a dispute

(a) 2 Ph. 619.

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this litigation has been going on for thirteen years without any person again raising the question. I am therefore of opinion, that the purchaser is not entitled to what he now asks.

Nov. 14th &
17th.

TURVIN v. NEWCOME.

*Will—Accu-
mulation—
Perpetuity.*

Devise, in 1826, of real estate to trustees, in fee, upon trust for one for life, and then for his first and other sons successively, in tail, with a direction to the trustees, during the minority of any cestui que trust, to receive the rents and invest and accumulate the same, and to hold such accumulations upon the same trusts as were declared concerning the real estates:—*Held*, that the trust for accumulation was void.

FRANCES CONYERS, by her will, dated in 1826, gave and devised her *Essex* estates to the Defendants *Richard Newcome* and *Joseph Maberly*, and their heirs, in trust for the testatrix's great nephew *James Michael Hankin Turvin*, then *James Michael Hankin*, and his assigns, for life; and from and after his decease, then in trust for his first and other sons successively in tail; and for default of such issue, in trust for his daughters as tenants in common in tail, with cross remainders between them in tail; and if there should be but one such daughter, then in trust for such only surviving or only daughter, in tail; and after a direction that the person or persons taking the rents and profits of the said *Essex* estates should, within twelve months after attaining twenty-one, take and use the surname of *Turvin* after his or their own family surname or surnames, the testatrix continued her will as follows: "Provided also, and my will further is, that, during the minority of any person or persons taking any estate or interest in the said farms, lands, and hereditaments, under the limitations of this my will, the rents and profits thereof, or of such part thereof as shall have become vested in such person or persons, being a minor or minors as aforesaid, shall be received by my said trustees, or the survivor of them, or the heirs or assigns of such survivor, and shall be by them or him (after making all necessary allowances and payments thereout, and satisfying all expenses incident to the said trust,) laid out and invested in their or his

names or name, in the public stocks or funds, or upon Government or real securities, at interest; and the interest, dividends, and yearly proceeds thereof shall be from time to time invested in like manner, and added to the capital; all which said stocks, funds, and securities, and the accumulations thereof, shall be vested in the said trustees or trustee, and be held by them upon the same trusts, intents, and purposes as are hereinbefore limited and directed concerning the said farms, lands, and hereditaments, so far as the different nature of the property will admit, or such of them as shall be then subsisting, and capable of taking effect." And, after various other devises not affecting her *Essex* estates, the testatrix gave all the rest and residue of her real and personal estate not thereinbefore otherwise disposed of, subject to the payment of her just debts, and funeral and testamentary expenses, to her cousin *Sophia Milles*, her heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively; and the testatrix appointed the Defendants her executors.

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She died in 1827, leaving the said *J. M. H. Turvin* surviving, and then an infant of the age of nine years.

J. M. H. Turvin attained twenty-one, and subsequently died, leaving the Plaintiff his sole executrix. She filed this bill against the executors and trustees of the will, praying a declaration, that the trust for accumulation of the rents and profits of the *Essex* estates, in the said will of *Frances Conyers*, was void; and for payment to the Plaintiff as the legal personal representative of the said *J. M. H. Turvin*, of the fund accumulated.

Mr. *Rolt*, Q. C., and Mr. *Batten*, for the Plaintiff:—

Argument.

The direction to accumulate is void, because, if successive

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tenants in tail were to die under age, it might go on for ever: *Marshall v. Holloway* (a), *Browne v. Stoughton* (b).

Mr. Cairns, Q.C., and Mr. Freeling, for the Defendants:—

The proviso is good, because it can be barred by any tenant in tail. [VICE-CHANCELLOR.—This is a collateral power, like a power of sale vested in trustees.] The accumulated fund is limited to go as the real estate; therefore, the first tenant in tail would take all the accumulations then made, absolutely, and it would not extend beyond the time sanctioned by law. If there should be another infancy, the trust for accumulation would be a new one.

Mr. Rolt, Q.C., in reply.

The VICE-CHANCELLOR reserved judgment.

Nov. 17th.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It seems to me, that this case has been determined by *Browne v. Stoughton* (b). Perhaps, however, it is somewhat less strong in one respect. In *Browne v. Stoughton* the legal estate was limited in strict settlement. Here, the legal estate is vested in trustees. It was argued, that all that is directed by this testator is that which the Court would direct the trustees to do during the minority of the parties who are entitled respectively to receive the rents and profits. They are to take what is called the surplus after the necessary allowances and payments, whatever they may be, and they are directed to invest it; and so far I accede to the argument, that, the property being rents, this would give absolute interests to those cestui que trusts who are interested as tenants in tail. It was then argued, that, therefore, the object and destination of the property,

(a) 2 Swanst. 432.

(b) 14 Sim. 369.

when accumulated, would fall within the limits assigned by law; and in that I do not follow the argument entirely. It is not so; because there is no doubt that here, although the accumulations during his time would belong to each successive tenant in tail, and would not go over from one tenant in tail to the next, and the like, still the trust is declared to arise during every successive tenancy in tail, and, in this respect, it is the same as in *Marshall v. Holloway* (a) and *Lord Southampton v. The Marquis of Hertford* (b). It is true, that the destination of the money is not carried over from one tenant in tail to the next, as it was in those cases, until some tenant in tail attained majority; but there is a positive trust for accumulation fixed upon this property during the whole period, while the successive cestuis que trust are under age; and it has been settled that this exceeds the limit which the law will permit for the duration of such a trust. The Vice-Chancellor, in *Broune v. Stoughton*, observed, "that it did not, in his judgment, depend upon what the destination of the fund was, but upon the legality of the constitution of the trust;" and the argument that this is no more than what the Court would order, has been often used unsuccessfully. Mr. Justice Buller, in *Thellusson v. Woodford* (c), says, that the question of accumulation is consequential upon the limitation of the property, that is to say, is legal where the limitation is so. Where the limitations themselves are valid, the possibility that accumulation may result from such legal limitation, by reason of successive infancies and the like, which may prevent, for an indefinite period, the estate tail from being barred, is not a reason for holding that the limitations themselves are void. It is quite true, that, if no such provision as this had been made, the probable course of the Court would have been to direct the trustees to do that which they are directed to do by this will; but that would have

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 Judgment.

(a) 2 Swanst. 432.

(b) 2 Ves. & B. 54.

(c) 4 Vca. 320-1.

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 —
Judgment.

been by the operation of the Court, acting upon the limitations which it finds in the will, for the benefit of the infants whose estates would be properly limited, whereas, here, the testator himself affects to create the trust; and following the case of *Browne v. Stoughton*, I must hold the trust so created to be void.

The persons interested in the fund are not here, but it seems that it is a case in which there is actual authority upon the subject, and it was not necessary to call upon those parties to appear. The case has been extremely well argued by the counsel for the trustees, and of course they will be in a position to communicate to the cestuis que trust what is the decision of the Court.



*Nov. 21st &
 24th.*

LLOYD v. LLOYD.

Will—Construction—Devise to Class.

A devise of land to trustees in fee, upon trust to pay the rents to the testator's daughter for life, and after her death to apply them in the maintenance of all and every her child and children, during their minority, and when and as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell, and to pay the proceeds of such sale "to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child."—*Held*, that one of several children who survived the testator, having died under twenty-one, took no share.

THOMAS ROBINSON, by his will, dated in 1808, gave and devised his freehold messuage, tenement, or dwelling-house, with the hereditaments and appurtenances thereunto belonging, situate in *Bull-street*, in *Birmingham*, to *Samuel Lloyd* and *William Shorthouse*, and their heirs, upon trust, that they, and the survivor of them, and his heirs, should pay to, or permit the testator's daughter *Sarah Enoch*, since deceased, wife of *Robert Enoch*, since deceased, and her assigns, to receive and take the rents and profits thereof for her life, for her separate use; and, after her decease, upon trust, that they the said trustees, or the survivor of them, and his heirs, should apply the rents, issues, and profits of the said premises for and towards the maintenance, education, and benefit of all and every the child and children of his said daughter *Sarah Enoch*, during their minority, and

and to pay the proceeds of such sale "to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child."—*Held*, that one of several children who survived the testator, having died under twenty-one, took no share.

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when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell and dispose of the said last-mentioned messuage or dwelling-house and premises, if it should be thought right, for the most money and the best price that could or might be had or gotten for the same; and the money arising therefrom to pay and apply to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child, for his, her, or their respective use and benefit, and as his or their own proper moneys absolutely.

There was no gift over.

Thomas Robinson died in 1809; *Robert Enoch*, the husband of the said *Sarah Enoch*, died in March, 1817; *Sarah Enoch* died in October, 1853, having had issue seven children, and no more; all of whom, with the exception of two, named respectively *Arthur Enoch* and *Arthur Gregory Enoch*, lived to attain their respective ages of twenty-one years; the said *Arthur Enoch* and *Arthur Gregory Enoch*, respectively, died after the decease of the said *Thomas Robinson* the testator, but under the age of twenty-one years.

A special case was now presented stating these facts.

The question for the opinion of the Court was, whether, according to the true construction of the will of the said testator *Thomas Robinson*, the Plaintiff, as the legal personal representative of the said *Arthur Enoch*, deceased, and *Arthur Gregory Enoch*, deceased, respectively, took any and what shares and interests of or in the proceeds to arise from the sale of the said messuage and premises in *Bull-street, Birmingham*; and how and in what shares such proceeds were distributable under the said will.

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Argument.

Mr. Rolt, Q. C., and Mr. Cole, for the Plaintiff, the representative of the two deceased children:—

The deceased children took vested interests. All the children were to have the benefit of the gift during their minorities; all are to share when the youngest attains twenty-one. The construction mainly depends upon what is the antecedent to the word "such" in the direction for the application of the proceeds of the real estate, and the only possible antecedent is 'all the children,' there is no other class mentioned. The direction for the application of the rents meanwhile assists this construction. [VICE-CHANCELLOR.—In that respect, the case seems like *Jones v. Mackilwain* (a).] And *Saunders v. Vautier* (b), where, the fund being separated and vested in trustees, upon trust to accumulate the dividends until the legatee attained twenty-five, and then to transfer the capital and accumulations to him, it was held that the gift was immediate, the enjoyment only being postponed. In *Re Smith's Will* (c) it was held, that a gift of a fund to trustees, with a direction that they should apply the interest for the benefit of certain persons during their minority, and to divide the capital between them on the youngest attaining twenty-one, with a gift over of the share of one who dies before that period, constitutes a legacy debitum in præsentī solvendum in futuro, and any of the class attaining twenty-one acquires a right to the payment of his share.

Mr. Cairns, Q. C., and Mr. Hedge, for children who had attained twenty-one:—

The word "such" in this gift must be referred to children who should have attained twenty-one, which is the class just before mentioned. It is clear that the testator thought that all would attain that age. In *Jones v. Mackilwain* (a)

(a) 1 Russ. 220.

(b) Cr. & Ph. 240.

(c) 20 Beav. 197.

there was a separate provision for the maintenance of each child, just as in *Hanson v. Graham*(a). *Re Smith's Will*(b) merely declared the right of a child who had attained twenty-one. In *Parker v. Sowerby*(c), land was devised to trustees, with power to let, and they were directed to pay a small annuity out of the rents, the other part to pay the testator's debts; and, after the youngest of his nephews and nieces was of age, to sell and divide the proceeds equally amongst all the testator's nephews and nieces, and some, who died under twenty-one, were excluded from sharing. There was not a previous life estate in that case, but the life estate here given is not the reason for delaying the sale. In *Leeming v. Sherratt*(d), Vice-Chancellor Wigram observes, "the testator having postponed the division of the residue until his youngest child attained twenty-one, I think no child who did not attain that age could have been intended to take a share therein."

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—
Argument.

Mr. Taylor, for parties in the same interest, and for the testator's heir, cited *Ford v. Rawlins*(e) and *Davies v. Fisher*(f), the latter as an authority, that a direction for maintenance, not covering the whole period until distribution, does not make the gift vest at once.

Mr. Rolt, Q. C., in reply.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD (after stating the words of the will, and the facts of the case, to the effect above given, continued as follows):—

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—
Judgment.

(a) 6 Ves. 239.

(b) 20 Beav. 197.

(c) 1 Drew. 488.

(d) 2 Hare, 23.

(e) 1 S. & S. 328.

(f) 5 Beav. 201.

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 —
Judgment.

The question is, whether the two children who died under twenty-one are excluded from the benefit of this gift. As regards the grammatical construction, it reads as though the direction had been to pay and apply the rents and profits for the benefit of all the children during their minorities, and until all have attained twenty-one, and then to pay and apply the capital amongst all the children. I think the word "such" in this will, would strictly apply to a gift of that description. But, according to the decision in *Parker v. Sowerby*(a), the real question is, whether, in a will framed in this shape, it is intended that children who die under twenty-one should acquire any vested interest in the property. I referred, during the argument, to an authority which seemed to justify that claim: *Jones v. Mackilwain*(b); but there the limitation of the rents and profits was to each of the children respectively, and then there was a gift to them of the capital at twenty-one; and, therefore, that case was brought within the principle of *Hanson v. Graham*(c), and children who died under twenty-one were held entitled to take.

Looking narrowly at the form of the instrument here, it is plain that no such question arises. The rents and profits are to be applied for the maintenance of all the children "during their minority." No doubt the testator contemplated, that all the children would live to attain twenty-one; and I must consider what is the true intent of the gift, all the circumstances of the case and the expressions of the will being regarded. With respect to the direction for the application of the rents and profits until all attained twenty-one—whatever might be the case if one only attained twenty-one, while others were under that age, whether it might then be possible to extend the meaning of the words,

(a) 1 Drew. 488.

(b) 1 Russ. 220.

(c) 6 Ves. 239.

as was done in *Davies v. Fisher* (a)—it is plain to my mind, that the testator never intended that those children who died under twenty-one should have such an interest that their executors should receive their shares of the rents until all the children should have attained twenty-one. There are no words to carry such a gift, and nothing can be conceived further from the intention. This view of the case takes it out of the rule in *Hanson v. Graham* (b), that shares are vested when all the intermediate interest and profits are given to the legatees.

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 Judgment.

The question remains, whether there is not a good gift to all the children, when all attain twenty-one. It is important to observe the intention. According to *Parker v. Sowerby* (c), and a dictum in *Leeming v. Sherratt* (d), where there is a gift of this kind, the testator intends that the parties who are to take should be those who at the time are found in the enjoyment of the rents and profits—those for whom he has provided until the period of distribution. It is inconsistent to suppose that he provides for one class until that period, and then for another. The gift must be read as though the testator had said, “I intend this for the benefit of all those children who do in fact attain twenty-one. I postpone the division until all attain twenty-one; and I give the rents and profits to them for their maintenance, during their respective minorities; and the distribution is to be among those who shall be receiving the rents and profits when the youngest child attains twenty-one.”

Therefore, the two children who have died under twenty-one took no share.

(a) 5 Beav. 201.

(b) 6 Ves. 239.

(c) 1 Drew. 488.

(d) 2 Hare, 23.

1856.

Nov. 5th &
7th.

DONCASTER v. DONCASTER.

*Settlement—
Real Estate—
Limitation
by Reference
of Personal
Estate—Power
—Perpetuity.*

A settlement, on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, and, after the death of the survivor, "in trust for and to be

released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children as tenants in common in tail; and in default of issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed, personal property was assigned to the same trustees, upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject to the same powers, provisos, contingencies, declarations, and agreements as were thereinbefore expressed concerning the payment by the trustees of the rents and profits of the said real estate thereby conveyed, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit."—*Held*, that this trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate.

This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next of kin; the meaning of such proviso being only, that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next of kin.

There was only one child of the marriage, who died an infant in the lifetime of his father. On the subsequent death of the father—*Held*, that such child took an absolute interest in the personalty, subject to open and let in other children, if any.

Part of the personal property consisted of a share of real estate under a will, by which it had been devised in trust for sale; and the settlement contained a power for the trustees, with the consent of the husband and wife, and with the concurrence of the persons entitled to the other shares of this property, to elect to take it as real estate, and to hold it upon the trusts of the other real estate contained in the settlement.—*Held*, that this power did not alter the construction of the limitations of the personal estate; but that, when the settled personal estate became the absolute property of the child, the power could no longer be exercised.

WILLIAM THOMPSON, by his will, dated in 1812, devised and bequeathed all his real and personal estate to trustees, upon trust to sell and convert the same; and out of the proceeds to pay his debts, funeral, and testamentary expenses, and, after payment thereof, to invest the residue in Government or real securities; and to pay the income, or a competent part thereof, in and towards the maintenance, education, and bringing up of his daughters *Anna Maria* and *Ellen*, during their respective minorities, and to accumulate the residue. And as and when his said daughters should respectively attain the age of twenty-one years or be married, which should first happen, then upon trust to pay

and divide the residue and surplus of the said trust money, or otherwise assign or transfer the stocks, funds, and securities whereon the same might then be invested, and also all accumulations in respect thereof, unto and between his said daughters *Anna Maria* and *Ellen*, in equal shares and proportions; and he appointed his trustees executors.

In March, 1812, the testator died. Two of the executors proved and acted, and they converted the greater part of the estate of the testator; but a messuage with the appurtenances in *Princes-street, Manchester*, part of the hereditaments devised in trust for sale, remained unsold.

By the settlement made previously to her marriage with *William Doncaster*, after reciting the aforesaid facts, *Anna Maria* conveyed to *William Edward Tallents* and *John Doncaster*, their heirs and assigns, certain other hereditaments; To hold the same, after the solemnisation of the said marriage, unto the said *William Edward Tallents* and *John Doncaster*, their heirs and assigns, for ever, upon trust for *Anna Maria* for life; and, after her death, for *William Doncaster* for life; and from and after the decease of the survivor of them, the said *A. M. Doncaster* and *William Doncaster*, then "upon further trust that they the said *William Edward Tallents* and *John Doncaster*, and the survivor of them, and the heirs of such survivor, or the trustees or trustee of the said indenture for the time being, should stand seised, possessed of, or entitled to the same, in trust for *and to be released and conveyed unto* all and every (or such one or more, exclusively of the others or other of them) of the child or children of the said intended marriage," as the said *William Doncaster* and *Anna Maria*, or the survivor of them, should appoint; and in default thereof, or subject thereto, "in trust for *and to be released and conveyed unto* all and every the child and children of the said intended marriage," and the heirs of

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their, his, and her body, or respective bodies, to be divided between or amongst them, in equal shares, as tenants in common and not as joint tenants, with cross-remainders between them in tail. And on the death and failure of issue of all the said children except one, "upon trust for and *to be released and conveyed unto* such one child, and the heirs of his or her body lawfully issuing;" and in default of such issue, and in case also that the said *Anna Maria* should happen to survive the said *William Doncaster*, "upon trust for *and to be released and conveyed unto* and to the use of the said *A. M. Doncaster*, her heirs and assigns, for ever." And, by the same deed, the said *A. M. Doncaster* assigned to *William Edward Tallents* and *John Doncaster*, their executors, administrators, and assigns, all that moiety or equal undivided half-part or share of her the said *A. M. Doncaster* of and in all and singular the moneys to arise from the sale or disposition of the said hereditaments and premises, situate and being in *Princes-street, Manchester*, which were late the estate and inheritance of the said *William Thompson*, deceased, and were by his said will devised for sale as before mentioned, and which then remained unsold, and other personal property of the said *A. M. Doncaster*: To hold the said last-mentioned premises unto the said *William Edward Tallents* and *John Doncaster*, their executors, administrators, and assigns, upon trust to invest the same, and to pay the income thereof, and the rents and profits to be received until sale of the said estates late of the said *William Thompson*, and also the principal of the same respectively, *to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject in all respects to such and the same powers, provisoes, contingencies, declarations, and agreements as were thereinbefore expressed and declared concerning the payment and application by them, the said trustees, of the said rents and profits of the said hereditaments and premises, there-*

inbefore mentioned to be thereby granted and released, concerning their release and conveyance of the same hereditaments and premises respectively, or as near thereto as circumstances and the nature of the case would admit.* Provided, that the ultimate remainder thereinbefore limited in favour of the right heirs of the said *A. M. Doncaster*, in respect of a moiety of the thereinbefore mentioned hereditaments and premises in *Manchester*, should, in respect of and as for and concerning the moiety of so much of the said trust moneys and premises thereinbefore assigned, as should, at the time of such ultimate remainder, be and remain of the nature of personal estate, be deemed and construed to be for the benefit of such person or persons as would have been the next of kin to the said *A. M. Doncaster* according to the Statute of Distribution of intestates' personal estates, in case she had died unmarried and intestate. And it was thereby further declared, that if, at any time thereafter, any of the said hereditaments in *Princes-street, Manchester*, late the estate of the said *William Thompson*, deceased, should remain unsold under the powers and trusts for that purpose in his said will contained, and it should be thought expedient or advantageous by the trustees of the settlement (with the consent and approbation thereafter in that behalf mentioned), and the said *Ellen Doncaster*, or the person or persons who, for the time being, should be entitled to her moiety of the moneys to arise from the sale of the said hereditaments in *Princes-street, Manchester*, to release and extinguish the said trust and power for sale created and given by the said will of the said *William Thompson*, deceased, as thereinbefore mentioned, and to vest the same real estates and hereditaments, and the fee and inheritance thereof, or so much thereof as should then remain unsold and undisposed of as thereinbefore mentioned, in them the said trustees of the settlement for the time being, and the said *Ellen Doncaster*, or the person or per-

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sons so to be entitled to her moiety of the said moneys to arise from the sale thereof, in undivided or divided moieties, freed and discharged of and from the said power of sale created by the said will of the said *William Thompson*, and the trusts thereof, from all incumbrances affecting the same: then, and in such case, it should and might be lawful for the trustees or trustee of the settlement for the time being, with the consent of the said *William Doncaster* and *A. M. Doncaster*, or of the survivor of them, testified in writing under their, his, or her hands and seals, or hand and seal; and, after the decease of such survivor, then of the proper authority of the said trustees for the time being, to release and extinguish, and to join and concur with the said *Ellen Doncaster*, her heirs, executors, administrators, and assigns, and with all and every other necessary and proper parties, in releasing and extinguishing the power of sale created by the said will of the said *William Thompson*, and then subsisting, of and concerning such and so many of the said hereditaments as should then remain unsold and undisposed of, and all other trusts, powers, and authorities in the said will contained, touching and concerning the same, and by the same or any other deed or deeds, instrument or instruments, to accept and take a conveyance unto and to the use of them the trustees or trustee of the settlement for the time being, and their or his heirs and assigns, of one undivided moiety or equal half part of and in the said hereditaments in *Princes-street, Manchester*, or so much and so many of them as might then remain unsold and undisposed of under the trusts of the said will of the said *William Thompson*, freed and absolutely discharged of and from all other charges and incumbrances: or otherwise, it should and might be lawful to and for the said *Edward William Tallents* and *John Doncaster*, or the survivor of them, and the trustees or trustee of the said indenture for the time being, by the same or any other deed or deeds, instrument or instruments,

to accept and take of a conveyance to them or him, or their or his heirs, of a divided moiety of the said hereditaments, (free from all incumbrances as thereinbefore mentioned), under and by virtue of the power of partition and division thereinbefore contained; and it was thereby further declared and agreed, that, upon such conveyances being made to them the said trustees or trustee of the settlement for the time being, of the said undivided or divided moiety, as the case might be, of the said hereditaments in *Princes-street, Manchester*, or of any part or parts thereof, they and he should stand seised of or possessed thereof, as of the nature of real estate, To, for, and upon such and the same uses, trusts, ends, intents, and purposes, and with, under, and subject to such powers, as well of sale as of exchange or partition, and all other powers, provisions, conditions, limitations, declarations, and agreements as were therein mentioned, limited, or declared of and concerning the several hereditaments and premises thereby granted, or to, for, or upon such and so many of them as would be then existing or capable of taking effect.

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There was issue of the marriage one child only, *William Thompson Doncaster*, who was born in October, 1834, and who, on his birth, became under the settlement entitled as tenant in tail in remainder to the said settled hereditaments and premises; and, as the said bill alleged, entitled absolutely in remainder to one moiety of the moneys to arise from the sale of the said hereditaments and premises in *Princes-street, Manchester*. This child died shortly afterwards, leaving his father the said *William Doncaster*, surviving, who thereupon, the bill alleged, became entitled to the interest of his said child in the said moneys to arise from the sale of the said hereditaments and premises in *Princes-street, Manchester*, aforesaid.

The hereditaments and premises in *Princes-street, Man-*

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chester, were, in the month of January, 1846, sold for the sum of 1210*l.* 605*l.*, part of this, was thereupon paid into the hands of the trustees of the settlement, and was subsequently by them paid over to *A. M. Doncaster*.

William Doncaster, by his will, dated the 18th of January, 1849, devised and bequeathed to *Godfrey Tallents* and *Robert Griffin* all his real and personal estate, upon trust to sell, and to pay and divide the residuary proceeds equally amongst the Plaintiffs in this suit; and the testator appointed the said *Godfrey Tallents* and *Robert Griffin* executors and trustees of his will. He died on the 20th of January, 1849, and his will was duly proved by the said *Godfrey Tallents* and *Robert Griffin*, who afterwards, on the 9th day of June, 1855, procured letters of administration to the said *William Thompson Doncaster*, the only child of the said *William Doncaster*.

The bill prayed a declaration, that the hereditaments in *Princes-street, Manchester*, which, under the trusts of the will of *William Thompson*, were converted into personalty, remained so converted under the trusts of the settlement of the 20th day of August, 1823. And that, under the trusts of the said settlement, the said *William Thompson Doncaster*, deceased, on his birth became entitled to an absolute vested interest in a moiety of the moneys to arise from the sale of the said hereditaments; and that the same, on his decease, became vested in his father the said *William Doncaster*, deceased, and passed by his will to the Plaintiffs; and that the said *Godfrey Tallents* was a trustee for the Plaintiff of the moneys in his hands, which had arisen from the sale of the said hereditaments; and also of the said sum of 605*l.* so paid to the said *A. M. Doncaster*, as aforesaid, subject to the life interest therein of the said *A. M. Doncaster*; and that the said *A. M. Doncaster* might be decreed to repay the said sum of 605*l.* to the said *Godfrey Tallents* upon the trusts of the said settlement.

Mr. *Rolt*, Q. C., and Mr. *Berkeley*, for the Plaintiffs.

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Mr. *De Gea*, (Mr. *Cairns*, Q. C., with him), for the Defendants.

The arguments are fully stated in the judgment.

The cases cited were *Foley v. Burnell* (a), *Vaughan v. Burslem* (b), *The Countess of Lincoln v. The Duke of Newcastle* (c), and *Boydell v. Golightly* (d).

[The VICE-CHANCELLOR, at the conclusion of the Defendants' arguments, said, that he had a strong impression in favour of the Plaintiff; but that, if upon consideration he should think it necessary, he would call for a reply in a few days.]

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VICE-CHANCELLOR SIR W. PAGE WOOD (after shortly stating the limitations in the settlement of the real estate, continued as follows:—)

The effect of these limitations is, that each child, at its birth, would take a vested interest in tail, subject to be divested or reduced by the execution of the power, which was a power of exclusion, or by the property being divided into more shares, in the event of other children being born.

This being the limitation of the settled estate, the settlement having recited, that the father of *Anna Maria Doncaster* had directed certain estates at *Manchester* to be sold, and the produce given in moieties to her and her sister, *Anna Maria Doncaster*, with the concurrence of her intended husband, assigned the money to be produced

(a) 1 B. C. C. 274.

(c) 12 Ves. 218.

(b) 3 B. C. C. 101.

(d) 14 Sim. 327.

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from the sale to the trustees of the settlement, upon trust to invest, and with powers to vary the securities; "and upon further trust to pay the yearly and other interest, dividends, and proceeds of the whole of the said moneys, estate, and premises thereby assigned, or intended so to be, and the rents and profits to be received until sale of the said estates late of the said *William Thompson*, and also pay and apply the principal of the same respectively, to such person or persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject in all respects to such and the same powers, provisoes, contingencies, declarations, and agreements as were thereinbefore expressed and declared concerning the payment and application by them the said trustees of the rents and profits of the said hereditaments and premises thereinbefore mentioned to be thereby granted and released, concerning their release and conveyance of the said hereditaments and premises respectively, or as near thereto as circumstances and the nature of the case would admit." The omission of the word "and" is of no real importance here; it should have been, "and concerning their release and conveyance of the same hereditaments and premises respectively." It is sufficiently plain to enable me to give the same meaning as if the word "and" were there; that is to say, *reddendo singula singulis*, the corpus was to be dealt with as the conveyance was directed to be made, and the income was to be paid as the rents and profits of the real estate. No one can doubt that there was a clear and distinct settlement of this personal property, by reference to and upon the same trusts as the land.

The first objection raised was, that the Court, although it might have been bound by *Foley v. Burnell* (a) and *Vaughan v. Burslem* (b), and that class of cases, where there is a

(a) 1 B. C. C. 274.

(b) 3 B. C. C. 101.

clear and distinct reference to trusts of real estate, ought to make a distinction where words of conveyance occur, as in every limitation of the corpus of the estate here, "in trust for and to be released and conveyed unto;" and it was argued, that this was an executory trust, as a conveyance was directed to be made, and that, therefore, the Court was at liberty to give to the limitations a construction, which would more facilitate the presumed intent of the parties, and was not tied down so rigorously by the strict rule of law, as if it had been simply a trust for these parties. I think, however, that, in this case, the words "to be released and conveyed" are by no means indicative of an executory trust; but they simply amount to a direction that the property is to be held in trust for these parties. There is a perfectly clear limitation of the equitable interest in the estate, and a mere direction superadded, that there shall be a release and conveyance according to the equitable interest, and nothing which indicates any special form or mode of conveyance; and the simple execution of the trust would be to clothe every person to whom a distinct equitable interest is limited, with the legal estate in that interest. I do not think, therefore, that any reliance can be placed upon these words "to be released and conveyed." Then, if so, independently of the other parts of the settlement, upon which I must say a word presently, the case seems to me clearly to fall within the authority of *Foley v. Burnell* (a) and *Vaughan v. Burslem* (b), and is distinguishable, upon the very ground on which Sir *Edward Sugden* distinguished those cases, from *Potts v. Potts* (c), where he held that a chattel interest in a newspaper was, upon the death of the tenant for life, to be assigned to the party who would then be in possession under the limitations of the settlement, and that it did not fall within the cases of *Foley v. Burnell* (a) and *Vaughan v. Burslem* (b); the application of which rule, in that case,

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(a) 1 B. C. C. 274.

(b) 3 B. C. C. 101.

(c) 3 J. & L. 353.

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would have carried it to a deceased party, who had never been in possession of the real estate; but he held that expressly on the ground that the conveyancer had, in order to escape the doctrine of *Foley v. Burnell* and *Vaughan v. Burslem*, carefully avoided limiting the personal chattels, by reference to the limitation of the real estate, which he considered would have been fatal to the view he adopted in his judgment; and had directed, in so many words, not a devolution of the chattel interest according to the devolution of the real estate, but an assignment of the chattel interest to the party who should happen to be in possession at the given time indicated by the express words, namely, at the death of the tenant for life of the real estate in question; and the ground of that distinction is only a corroboration of the rule itself.

Here, it seems to me, that the limitation has been made entirely with reference to the limitation of the real estate; and that, therefore, upon the real estate becoming vested in any child of the tenant for life, (subject, of course, to its being divested by appointment, or by the birth of other children), that child would take an absolute interest in the personal chattels.

It was argued, however, that I might construe this limitation in a different manner, not only on account of the words "to be released and conveyed," but also from the effect of the proviso which next follows the limitation of the personal estate. This is a peculiar clause, unquestionably, which made me take time to consider the question; and there is also something to be suggested upon the form of the power given to the trustees, with the consent of the husband and wife or the survivor of them, and with the concurrence of the other parties who are interested in the other moiety of the estate directed to be sold, to deal with the estate as real estate, following the limitations of the set-

tlement as to real estate, instead of treating it as personal estate. The clause which immediately follows the limitation of the personal estate draws the distinction taken in *Potts v. Potts* (a), which, though very plain, may perhaps be considered somewhat refined. [His Honour read the proviso.] If the words had been, that, whatever there was in the nature of personal estate, at the time of the vested remainder in fee to *Anna Maria Doncaster* taking effect in possession, should be conveyed to the person who then would be her next of kin, the case would have approximated much nearer to *Potts v. Potts* (a). But then there would have been this difficulty, that the limitation would have been void, because that ultimate limitation to *Anna Maria Doncaster* in fee is upon an indefinite failure of issue, and a trust to assign personal estate upon an indefinite failure of issue would be void for remoteness. I apprehend that the real sense, and plain intent, from the first words of that limitation, is this, that if the ultimate remainder in fee, limited to *Anna Maria Doncaster*, should come into possession owing to the failure of the preceding series of limitations, and if the personal estate, following the devolution of the real estate, should ever reach the point (which, by the rule of law in *Foley v. Burnell* (b), it never did), and the language of the settlement should have to be applied to such personal estate, in order to distribute it for the benefit of those representing *Anna Maria Doncaster*, her next of kin according to the statute were to take, and not her heirs, according to the words of the limitation of the real estate. It is simply defining what meaning the word 'heirs' shall have in that course of limitation; but it does not at all alter the direction before given, that the limitations of the personal estate were to follow those of the real estate, as near as circumstances would admit.

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Then, the other point, which occasioned some little doubt

(a) 3 J. & L. 353.

(b) 1 B. C. C. 274.

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in my mind, was, whether the power of saying that the real estate which was to be converted into personalty under the direction in the father's will, should be reconverted back to realty, by the operation of the consent of the trustees acting with the consent of the husband and wife or the survivor, did not also afford some indication that the whole matter was to be kept in suspense until the death of the survivor, because there would be this apparent inconsistency—if, after the death of the husband, when there could be no longer any issue of the marriage, and the only child had become absolutely entitled to the personalty, that interest on its death had been transmitted to those who represented the child, the equitable interest passing to those who represented the father,—the settlement might seem to contain a power to change this absolute interest after the death of the husband, by the action of the trustees with the concurrence of *Anna Maria Doncaster* the wife, and the property might be divested out of the husband, in order to place it in the possession of *Anna Maria Doncaster*; and it was said, that this ought to lead to a different conclusion as to the effect of the limitation. I think the sounder view is this, that, when once the interest became vested, the power itself was extinct, and it was no longer possible for the trustees, with the concurrence of *Anna Maria Doncaster* alone, to alter or change those rights which had actually accrued; and that this part of the case is somewhat analogous to that point which has been very much discussed, upon the operation of general powers in settlements where there is a series of limitations in tail, the objection originally to those powers being, as in *Ware v. Polhill* (a), that they were void, as tending to a perpetuity; and the answer given to that objection, which is now, I think, held to be the true answer, being, that, when once the estate is at home in any tenant in tail, who, by suffering a

(a) 11 Ves. 257.

recovery, or the like, has acquired the absolute interest, the power ceases. It seems to me, when once the estates became vested in the child's representatives in trust for the father's representatives, that this power would be at an end.

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It was then argued, that I ought, in this case, to consider that the property had been actually reconverted; I think there is not a trace of that in any part of the case. [His Honour referred to the facts relied on in support of this argument, which were altogether of a special nature, and continued:—]

The result must be, that I am compelled to hold, that this property passed to the child in the manner I have described, subject to its being divested by the birth of other children, and the exercise of the power by the husband and wife, or the survivor; and when the father died, and there was no possibility of any future children, then the administrator of the child became entitled to it, but as a trustee for the representatives of the father.

Declare, that these premises were converted into personality, and remained so converted under the trusts of the indenture of settlement; and that, under the trusts of the settlement, *William Doncaster*, deceased, on his birth, became entitled to a vested interest in a moiety of the money to arise from the sale of the said hereditaments and premises in *Princes-street, Manchester*, subject to the exercise of the power of appointment among the children reserved to the husband and wife or the survivor of them, by the same settlement; and, on the decease of the said *William Doncaster*, the father of the said infant, without there having been any other issue of the marriage, the interest which had so vested in the said *William Thompson Doncaster* had become absolute, and is now vested in the Defendant, the representative of the child, in trust for the

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estate of *William Doncaster*, the father of the said infant, and for the parties interested in his residuary estate under his will; then, as to the property disposed of, there must be a decree against *Anna Maria Doncaster*, to pay to the same representative that 605*l.*, to be held by him upon the same trusts.

It is not a repayment of money paid by mistake, as suggested in the argument, but it is a receipt of trust money, with the concurrence of the trustees.



IN RE THE TRUSTS OF DEMSTER HEMING'S DEED;

AND

*Nov. 15th &
 17th.*

OF THE ACT 10 & 11 VICT. c. 96.

*Trustees—10
 & 11 Vict. c.
 96—Costs.*

Trustees, who had paid into Court, under the Act 10 & 11 Vict. c. 96, an alleged balance, the title to which they believed undisputed,—the party they believed entitled having previously demanded payment, and offered a discharge pro tanto:—*Held*, not entitled to costs upon a petition for payment of the fund out of Court.

BY a deed executed previously to the month of June, 1856, real estate was conveyed by the Petitioner *Heming* to *Bischoff* and *Liefchild*, upon trust to sell, and to stand possessed of the moneys to arise from the sale, upon trust for payment of incumbrances upon the estate; and as to the residue of such moneys, upon trust to re-imburse themselves all costs, charges, and expenses to be incurred by them in the execution of the trusts of the deed, and subject thereto, in trust for the Petitioner.

In June, 1856, the estates were sold; and, in the following month, the trustees delivered to the Petitioner a cash account, shewing a balance due to him of 559*l.* 18*s.* 5*d.*

The Petitioner protested against certain items in the account, and demanded payment of the balance shewn to

be due to him, as mentioned above, offering to give the trustees any discharge or acquittance they might require for whatever balance they might pay to him, but without waiving his right to impeach the accounts. The trustees declined to pay the balance, unless the Petitioner signed an acquittance in respect of all demands against them as trustees.

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Subsequently, the trustees paid into Court, under the Act 10 & 11 Vict. c. 96, a sum of 741*l.* 15*s.* 5*d.*, stating by their affidavit, that they were not aware of any other person than the Petitioner being entitled to the fund.

The petition prayed for payment of the 741*l.* 15*s.* 5*d.* to the Petitioner.

Mr. Cairns, Q. C., and Mr. W. P. Murray, for the Petitioner, contended, that the trustees ought to be ordered to pay the costs of the application, or, at all events, that they ought not to be allowed any costs. The payment into Court was unnecessary and vexatious. The trustees had gained nothing by making it except a discharge pro tanto, and such a discharge had been previously offered by the Petitioner. Had they retained the money until the Petitioner agreed to settle the entire account, it would have been a different case, but the paying the money into Court was an abuse of the Act; and the more so, as the correspondence shewed an intention, on the part of the Petitioner, to take proceedings to impeach the accounts;—which brought the case within the principle of *In re Waring* (a).

Argument.

[The VICE-CHANCELLOR said, he had no jurisdiction under the Act to make the trustees pay costs; and the only

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question upon which he need hear their counsel was, whether they were to be allowed any costs.]

Mr. Rolt, Q. C., and Mr. Karslake, for the trustees:—

The words of the Act shew that the Legislature intended to provide for all cases in which trustees are desirous of being relieved; and the Court has been in the habit of putting the most liberal construction upon the words of the Act, not requiring trustees to suggest any reason for taking advantage of its provisions: *In re Croyden's Trust (a)*. Here, the trustees had a sufficient reason for the course they have taken. By adopting that course, they have prevented the Petitioner from imprudently instituting proceedings for taking an account; and now, on the hearing of the petition, they are willing to submit to a decree for an account, as if a suit had been instituted. Even if the course they have taken should appear to the Court unnecessary, still the circumstance, that they were led to adopt that course by the advice of counsel of the highest eminence, would be a sufficient reason for allowing them their costs upon this petition.

Mr. Cairns, Q. C., declined to take a simple decree for an account, on the ground, that it was necessary to make special charges as to certain items.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

Of course I cannot make a decree without consent, and, therefore, the order will be simply for payment of the fund in Court to the Petitioner.

With regard to the question of costs, although I acquit

(a) 19 L. J., Chanc., 173.

the trustees of all improper motives, they certainly made a mistake in paying the money into Court, as, by so doing, they obtained no better discharge than had been previously offered them by the Petitioner. It is an undoubted rule, that trustees cannot be called upon to pay over a balance until their accounts are settled; but if they choose to make a payment like the present, the Act does not give them a release as to their accounts, but only to the extent of the fund actually paid in; so that these trustees have in fact gained nothing by the course they have taken, while they have put the Petitioner to expense in getting the money out of Court.

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In the case of *Croyden's Trust*, there was a dispute between two parties as to the title to the fund. Here, the title to the fund is undisputed. The trustees, by their own affidavit, filed on paying the fund into Court, expressly state that they are not aware of any other person than the Petitioner being entitled to it.

The Court has no authority, under the Act, to make the trustees pay costs, but they cannot be allowed any costs, except the mere costs of paying the money into Court. Does the Petitioner object to their being allowed those costs?

[Mr. W. P. Murray having replied in the negative, an order was made for payment of the fund to the Petitioner; and the trustees were not allowed any costs, except those of paying the money into Court.]

But see
in re Woodburn's
trust. 2 G. 284.

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RUMBOLD v. FORTEATH.

Production of Documents—Affidavit—Heir—Ejectment—Practice in Chambers.

In a suit by the heir-at-law for discovery in aid of an action of ejectment brought by him against persons in possession, claiming as devisees of the ancestor:—*Held*, that the Defendants, whether bound to produce any documents or not, must make the usual affidavit in answer to a summons for production by the Plaintiff.

The practice on proceedings in Chambers is, that, if one side only desires to be heard by counsel, the Judge hears the argument in Chambers—if both desire to be so represented, the matter is adjourned to be heard in Court.

THIS was a bill of discovery. It stated, that *George Lord Ranccliffe*, deceased, was, in his lifetime, and at the time of his death, seised of or otherwise well entitled to certain freehold hereditaments, situated in certain parishes and places therein specified, in the counties of *Nottingham* and *Leicester*; and that he died on the 1st of November, 1850, without having ever had any issue; and that the Plaintiff and two other persons were his co-heirs at law in coparcenary; and it stated the pedigree of their heirship.

The bill then stated, that Lord *Ranccliffe*, some short time before his death, had executed a certain paper writing, dated the 26th of June, 1850, alleged by the Defendants to be his last will and testament, whereby he bequeathed all his personal estate to the Defendant *Harriott Forteath*, absolutely: and, that it was alleged that the testator thereby gave and devised all his real estates, whatsoever and wheresoever, to the said *Harriott Forteath*, her heirs and assigns; and appointed her sole executrix.

That, on the 21st of June, 1851, probate of the said paper writing, as of the last will and testament of the said Baron *Ranccliffe*, was granted by the Prerogative Court of the Archbishop of *Canterbury* to the said *Harriott Forteath*, as the executrix thereof; and that she possessed herself of the real and personal estate of the said Lord *Ranccliffe*; and that she and her husband, the Defendant *Alexander Forteath*, or one of them in her right, had ever since been and still were in possession of such real estates; and that she had also possessed herself of all the title deeds, documents, evidences, and writings of and relating to the said

real estates; and that the Plaintiff had lately commenced an action of ejectment against the Defendants *Alexander Forteath* and *Harriott Forteath* for the recovery of the possession of the said real estates.

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The bill then stated, that, at the time of the death of the said Lord *Rancliffe*, there were outstanding terms for years in the said real estates, or in some part thereof; and also mortgages and other incumbrances thereon, and leases thereof, which were still subsisting; but that, by reason of the Defendant *Harriott Forteath* having possessed herself of the deeds, documents, evidences, and writings aforesaid, the Plaintiff was unable to set forth the particulars of such terms of years, mortgages, incumbrances, and leases, or any or either of them; and that the Defendants threatened and intended to set up such outstanding terms of years, mortgages, and incumbrances, and leases, or some or one of them, in bar to the said action of ejectment; and that the Plaintiff, under the circumstances aforesaid, was unable to proceed at law for the recovery of the possession of the said real estates.

And the bill prayed discovery of all and singular the matters aforesaid, to enable the Plaintiff to proceed in and prosecute his said action of ejectment: and that the Defendants might produce at the trial of the said action all and singular the deeds, documents, evidences, and writings of or relating to the said real estates, or any or either of them, or such of them as might be necessary for the purposes of the trial of the said action: and for an injunction to restrain them from setting up outstanding terms, mortgages, incumbrances, or leases, or either of them.

The joint answer of the Defendants set up the will. They admitted the possession of all such of the title deeds, documents, evidences, and writings of or relating to the said

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 v.
 FORTREATH.
 —
Statement.

real estates as were not in the possession of the mortgagees of the same estates—admitted that there were outstanding terms, but offered not to set up any outstanding term or legal estate on the trial of or in bar to any action of ejectment by the Plaintiff; and therefore submitted and insisted, that, having regard to such offer, it was immaterial and unnecessary to state what terms, &c. there were in particular.

The Plaintiff moved, in Chambers, for production of documents. The Defendants refused to make the usual affidavit. The motion was adjourned into Court.

Mr. Cairns, Q. C., and Mr. J. S. Moore, for the Plaintiff:—

The Defendants are bound, at least, to make the affidavit. If all the story in their answer be true, they may yet have documents in their possession shewing that the will was obtained by fraud. In *Harrison v. Southcote* (a), Lord Hardwicke says, "Though an heir-at-law is not entitled to come into this Court upon an ejectment bill for possession; yet he is entitled to come here to remove terms out of the way, which would otherwise prevent his recovering possession at law, and has also a right to another relief before he has established his title, namely, that the deeds and writings may be produced, and lodged in proper hands, for his inspection." In *Lady Shaftesbury v. Arrowsmith* (b), the Lord Chancellor says, "It would be a very delicate point to order a general inspection into all deeds and settlements, on behalf of a person claiming in the mere character of heir-at-law. I do not find any spark of equity upon which that application could be made in this Court, and supported. The title of the heir is a plain one, and it is a legal title. All the family deeds together would not make his title

(a) 1 Atk. 539.

(b) 4 Ves. 70.

better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He must make out his title at law, unless there are incumbrances standing in the way which this Court would remove, in order to his asserting his legal right. There the principle of equity interferes."

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v.
FORTHATH.
Argument.

Mr. Willcock, Q.C., and Mr. Rolt, Q.C., for the Defendants:—

The Plaintiff wants no discovery. The will can be seen by him at Doctors Commons. We admit that Lord *Randiffe* was seised in fee of the property. There is no allegation in the bill impeaching the will.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It may probably be of little use, but I think that the common affidavit must be made. It is a very different question whether the Defendants will be compellable to produce the documents in their possession; but, at present, I cannot say that there may not be documents in their possession proving the Plaintiff's heirship, or in some way assisting his case.

Judgment.

Some discussion then took place as to the costs of the summons.

The VICE-CHANCELLOR.—I order now, that the affidavit shall be made, and the rest of the summons must stand over. When it comes on again in Chambers, I shall have jurisdiction there to dispose of the costs. This argument is merely heard here by adjournment from Chambers. The rule is, that, if one side only desires to be heard by counsel, I hear the application in Chambers: if both wish to be heard by counsel, it is adjourned into Court; but it is still the same proceeding by summons.

1856.

Nov. 17th.

GILLMAN v. DAUNT.

*Will—Construction—
Class—Distribution.*

Bequest to *J. D.* (a younger son of *A. D.*) as soon as he should attain twenty-one, but, in case he should die before attaining twenty-one, then to such of the other children of *A. D.* as should attain twenty-one. *J. D.* died an infant:—*Held*, that the words "such &c. as should attain twenty-one," were equivalent to "at twenty-one," or "when and as they should attain twenty-one," and that on *J. D.*'s death the share of a child who had then attained twenty-one became immediately payable, and no after-born child (if any) would be entitled to a share in the fund.

FRANCES GILLMAN, by her will, in 1845, bequeathed to the Plaintiffs all her stock in the *Union Bank of London*, upon trust to pay or transfer 2000*l.* thereof to *John Daunt*, a younger son of the Defendant *Achilles Daunt*, as soon as he should attain the age of twenty-one years; but in case he should die before attaining that age, then upon trust to pay or transfer the said principal sum of 2000*l.* unto such of the other children of *Achilles*, who, being a son or sons, should live to attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, and, if more than one, in equal shares; and to apply the dividends and interest thereof for their, his, or her benefit until payment to them, him, or her of the said principal sum of 2000*l.*

The testator died in May, 1846; *John Daunt* died in November, 1855, an infant.

Achilles had issue, at the death of *John*, nine children, of whom one, viz. *Achilles* the younger, had then attained twenty-one. The rest were still infants, and unmarried.

Mr. *Rolt*, Q. C., and Mr. *Boys*, for the Plaintiffs, as trustees, submitted, whether the beneficial interest in the stock set apart to answer the legacy of 2000*l.* was restricted to the children in esse at the death of *John*, one of such children having then attained twenty-one; or, whether after-born children (if any) would be entitled to share with them in the fund.

[The VICE-CHANCELLOR.—Does not *Whitbread v. Lord St. John* (a) cover it?

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Argument.

Mr. Rolt, Q. C.—There the bequest was to the children *when and as they should attain twenty-one*. Here, the words “such as shall attain twenty-one,” would seem to indicate a class.

Ellison v. Airey (b) was also cited.

Mr. Willcock, Q. C., and Mr. Renshaw, for *Achilles Daunt* the younger; and Mr. Kenyon for the other children of *Achilles* the elder, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have always taken the rule to be as it is stated by Mr. *Jarman*, that, “where a legacy is given to the children, or to all the children, of A., *to be payable at the age of twenty-one*, or to Z. for life, and, after his decease, to the children of A., *to be payable at twenty-one*; and it happens that any child, in the former case at the death of the testator, and in the latter at the death of Z., has attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take” (c): and for this reason, viz. that the child who has attained twenty-one cannot be kept waiting for his share; and if you have once paid it to him, you cannot get it back.

Judgment.

I think that the terms of this bequest, “such as shall attain twenty-one,” amount to the same thing as “at twenty-one,” or “when and as they shall attain twenty-one.”

I must therefore hold, that, on the death of *John*, the share of *Achilles* the younger, who had then attained

(a) 10 Ves. 152. (b) 1 Ves. sen. 111. (c) 2 Jarm. on Wills, p. 130.

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 GILLMAN
 v.
 DAUNT.

Judgment.

twenty-one, became immediately payable; and that no after born child, should there be any, will be entitled to a share in the fund.

There must be an order for a sale of the shares, and for payment of one-ninth of the proceeds to *Achilles Daunt* the younger.

Ordered accordingly.

Dec. 8th.

VANCE v. THE EAST LANCASHIRE RAILWAY COMPANY (a).

Company incorporated by Act of Parliament—Railway Company—Application to Parliament—Injunction.

BY stat. 9 & 10 Vict. c. ccclii, the Defendants, the company, were incorporated under the name of "The *East Lancashire* Railway Company."

The Plaintiff was a shareholder in the company.

Although it is competent to the directors of every railway company, on complying with the *Wharnclyffe* Order, to apply to Parliament for an extended line, or for any other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the company, and from issuing new shares, purporting to be shares in the company, except for the purposes and under the powers of existing Acts.

By stat. 9 & 10 Vict. c. ccclxxxii, the company were empowered to purchase the *Liverpool, Ormskirk, and Preston* line; and the purchase was effected.

Several extension and amendment Acts were subsequently passed for the benefit of the company, all of which contained the following proviso:—"That it shall not be lawful for the said *East Lancashire*, out of any money by the now stating or any other Act relating to the said company authorised to be raised for the purpose of such Act or Acts, to pay or deposit any sum of money, which, by any standing order of either house of Parliament now in force, or hereafter to be in force, may be required to be deposited, in respect of any application to Parliament for the purpose of obtaining an Act authorising the said company to construct

(a) Ex relatione Mr. *Regnier* been heard by the Vice-Chancellor *W. Moore*, the motion having been heard by the Vice-Chancellor in his private room.

any other railway, or execute any other work or undertaking." Accordingly, when further capital was required to be raised by preference shares, or for any special purposes, special powers and authorities were granted in the successive subsequent extension Acts, each of which (the last being the 17 & 18 Vict. c. cxvii, 1854) contained a provision similar to the above; and also that the sums thereby authorised to be raised by shares or mortgage should be applied only in carrying into execution that Act and the other previous Acts relating to the company.

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 VANCE
 v.
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 LANCASHIRE
 RAILWAY CO.
 —
Statement.

On the 6th of November, 1856, the Defendants, the directors of the company, issued a circular notice, convening an extraordinary general meeting of the company for the 12th instant, at *Bury*, for the purpose, first, of considering the propriety of authorising the directors to apply to Parliament, either alone or with other persons, for a bill to authorise the construction of a new line from *Colne* to *Bradford*, with all necessary powers; and, secondly, in case such application were authorised by the meeting, then to consider further the best way of raising the requisite capital; with an address to the shareholders, signed by the chairman, insisting on the loss which the company suffered from the want of such a communication as the proposed new line would open out, and the advantages offered thereby; and stating, that the proposed new line would be twenty miles in length, and would yield an estimated profit of 4*l.* 10*s.* per cent. on an estimated outlay of 800,000*l.*

On the 10th of November, advertisements appeared in the *London Gazette* of that date, referring to the new intended line, and headed "*Colne and Bradford Railway: Construction of the railway by the East Lancashire, or by new company;*" and proceeding to give notice of such intended construction.

1856.
 VANOE
 v.
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 LANCASHIRE
 RAILWAY CO.
 ———
Statement.

On the 12th of November an extraordinary general meeting of the company was held, pursuant to the circular notice of the 6th of November. The chairman moved the first resolution, stating, that no other company had been applied to for subscriptions to the new line, as the directors conceived it was most for the interest of this company to construct it as an integral portion of their own line. By this resolution, which was carried almost unanimously, the directors were authorised to apply to Parliament for the proposed bill. The chairman then moved a resolution, which was also carried by a similar majority, and by which, in contemplation of the passing of the bill, the directors were authorised to issue new shares representing an additional capital of 800,000*l.*, consisting of a 5*l.* per cent. preference stock for five years certain, with the privilege to the holders to convert it into ordinary stock of the company, at par in January, 1862; but if not then converted, the company to have a further period of five years to redeem the same. The proposed new preference shares were to be of the nominal value of 25*l.* each, and to be offered first to the existing shareholders; and a deposit of 3*l.* per share was to be payable immediately on the allotment. In case it should be necessary to reduce the nominal value of the proposed new shares, such reduction was to be made *pro ratâ*. In case of nonpayment of such deposit on the day appointed, the allotment was to be cancelled; and all new shares remaining in the hands of the company, after the distribution among the shareholders thereby authorised, were to be disposed of by the directors for the benefit of the company, as the directors might think fit; and all shareholders accepting the allotment of the proposed new shares were to execute such subscription contract as the directors should require.

By a letter of allotment, dated the 17th of November,

twenty-seven new shares were appropriated to the Plaintiff, and he was directed to pay, on or before the 10th of December, 81*l.*, being the deposit thereon of 3*l.* per share, to the bankers of the company.

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 Statement.

On the 20th of November, the secretary of the company wrote to the Plaintiff, informing him, in reply to an inquiry addressed to him by the Plaintiff on the subject, that the proposed application to Parliament had been advertised; and that, in anticipation of the passing of the bill, the directors intended to act on the resolution of the 12th of November, for raising the proposed capital.

On the 5th of December, the Plaintiff filed his bill against the company and its directors, praying for an injunction to restrain the directors from applying any of the funds of the company in or towards surveying the proposed new line from *Colne* to *Bradford*, or in or towards the preparation or promotion of any bill in Parliament for the construction of such new line; and from issuing, allotting, or keeping in circulation any new preference shares for the purpose of raising capital to enable them to construct such new proposed line, and to cancel any such new preference shares as might have been already issued for such purpose; and to have any part of the assets of the company which might have been applied to any such purposes replaced by the directors.

The secretary of the company made an affidavit, stating, that the resolution passed at the meeting authorising the creation of the 5*l.* per cent. preference new shares, was considered by the directors to be, and that the same was in fact prospective, and conditional upon the Act being obtained, in all the particulars of such resolution, except the immediate raising, by subscription, sufficient funds to provide for the parliamentary deposit and preliminary expenses, and the execution of the necessary subscription deed; and

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 ———
Statement.

further, that the directors were not in fact parties to the arrangement for raising the said funds, otherwise than as any of the directors or shareholders might think fit, individually, to become parties to the subscription contract; and save that, as the proposed new line was to be worked in conjunction with the existing line, it was obviously necessary to obtain the sanction of the company, with a view to the adoption of the new line by the company: that the subscribers to the proposed new line were aware that they could not legally, at present, have any claim on the existing company, and were subscribing only in expectation of Parliament granting the necessary powers: that the directors had not paid, and did not intend to pay, any preferential interest or dividend in respect of new shares allotted or subscribed for, until they should have power from Parliament; that the 3*l*. per cent. deposit was carried to a separate account; and that all payments of the preliminary surveys and expenses, so far as the same had been disbursed, had been made out of the funds so produced; that the surveys had been made, not as suggested in the bill, by the engineer of the existing company, but by another engineer (who was named) and who was not then, and never had been, a servant or officer of the company; and he denied any intention on the part of the directors, as suggested in the bill, of applying any part of the property of the company in payment of preliminary expenses or promotion of the bill for the proposed new line.

The subscription contract of the proposed new works purported to be made between the several persons named in the schedule thereto of the first part, the *East Lancashire* Railway Company of the second part, and trustees of the third part. It recited, that the company had agreed to apply to Parliament for powers to construct the intended line as part of their own line, and (subject to the approval of Parliament) to deem the sums contributed by the subscribers

as part of their own capital, and (subject as aforesaid) to grant to such subscribers such privileges as were enumerated in the said second resolution. The deed then gave to the directors of the *East Lancashire* for the time being such power to alter the termini or intermediate course of the proposed new line, and to appoint and remove all engineers, &c., and other officers, and to make all arrangements which they might think proper with landowners, &c., and nominate the directors for the time being to be the committee of management of the proposed undertaking, with power to name sub-committees, and the *East Lancashire* then covenanted as above recited, (subject as aforesaid).

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 ———
Statement.

Mr. Rolt, Q.C., and Mr. *Regnier W. Moore*, now moved for an injunction:—

Argument.

They denied the right of the directors, under the circumstances, to apply to Parliament at all for the proposed extension. The directors were trustees for the existing company, and had no right to put that company, or its officers, in motion for such a purpose.

At all events, the directors had not a right to defray the expenses of the application to Parliament, either out of the existing assets of the company, or out of the proceeds of new shares, purporting to be shares of, and guaranteed by, the company.

They cited *Colman v. The Eastern Counties Railway Company* (a) and *Munt v. The Shrewsbury and Chester Railway Company* (b).

[The VICE-CHANCELLOR intimated his opinion, that the directors were not precluded from applying to Parliament for the proposed extension. Their power to appropriate the

(a) 10 Beav. 1.

(b) 13 Id. 1.

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 LANCASHIRE
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 —
Argument.

corporate funds for the purpose of such application was another matter.]

Mr. *Cairns*, Q.C., and Mr. *Bird*, for the Defendants:—

If it be once admitted, that the directors have power to apply to Parliament for an Act, all incidental powers must be inferred, and, among them, the power of raising the requisite funds in the mode which the Plaintiff seeks to restrain. If they are to be promoters at all, the directors, like any other promoters, may acquire funds, and take charge of and apply those funds in any way they find most convenient. The proviso in the company's Acts against applying the company's funds in payment of deposits, raises an inference that, for expenses, other than the deposit, incident to obtaining an Act, the funds may lawfully be applied.

They cited *Stevens v. The South Devon Railway Company (a)*.

Mr. *Rolt*, Q.C., in reply.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have no doubt of the power of an existing company to apply to Parliament for an extension of its line. But it is somewhat more than this, if it applies the corporate funds to that purpose.

What is called the *Wharnccliffe Order (b)* arose out of the proceedings before a committee of the Lords on the *Stockton and Darlington Railway Bill*, one of the first in which I was engaged when at the bar. We succeeded in that case notwithstanding *Natusch v. Irving (c)*, on two grounds:

(a) 13 Beav. 48.

(c) Gow on Partnership, p. 398.

(b) Standing Orders of the 3rd edit.; S. C., 2 C. C. 358.
 House of Lords, clxxxv.

first, because that case arose on a private partnership, not on an incorporated company; and secondly, because we shewed that our application did not involve necessarily any misapplication of the corporate funds. Then Lord *Wharncliffe* proposed as a standing order of the house, that, before any such bill should pass the House of Lords in future, three-fifths of the shareholders present at the meeting should consent to an application being made for such bill. I think no doubt has ever existed, since that time, that it is competent to the directors to apply, from time to time, to extend their line to other purposes wholly beyond that contemplated by the original Act of incorporation, and that no resistance of any individual shareholder is of any avail, if the consent has been obtained which I have referred to.

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 Judgment.

It afterwards came to be considered before this Court, how far any part of the existing property of a corporation could be applied in payment either of preliminary expenses, or of the expenses of passing a bill through Parliament. Mr. *Bird* contended, that if it was once admitted that the directors had power to come to Parliament for the Act, all powers incidental to that must be inferred. It is quite clear that this is too large an inference; for instance, one of the most necessary consequences of applying for an Act, viz. the incurring expense, is just what this Court will not permit. If they apply to Parliament for an Act, the Court will not prevent them from so doing, on the ground of dissenting shareholders objecting to it; but they are not permitted to apply any portion of the funds towards any part of the expenses necessary for this new purpose. They cannot divert the funds to any purpose other than those sanctioned by the existing Act of the corporation.

On the first ground, I should have been quite content to have taken the affidavit of the secretary, namely, that the

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—
Judgment.

directors had repaid whatever sum, large or small, had been expended. I take that to be the effect of the affidavit, and Mr. *Cairns* was instructed to argue it in that way, namely, that the directors had taken some portion of the money under their control as directors, for the purpose of paying some expenses, which had been incurred with reference to these proceedings; but the moment they conceived they were lawfully receiving sums under this subscription contract, they repaid that sum; and he states positively that it is not their intention to apply any moneys whatever of the company towards the project that they have in hand. As far as that alone is concerned, I should have been content with their undertaking that they would in future so act.

But the second question here is, the effect of the contrivance—I do not mean to use that word in any improper sense—of raising money. I do not think this particular mode of raising money for the purpose of carrying new plans of extension before Parliament has ever been brought into Court before. Difficulties are always found, no doubt, in providing funds for the subscription contract. Parliament has, in this case, expressly said, what the Court of Chancery said before, that no part of the funds of the company shall ever be applied towards the deposit for any new project for extension. Mr. *Bird* argued thence, that I was to infer that Parliament would permit an application of the funds to anything new, except the deposit. That again I think would be too large an inference, looking at the decisions of this Court. It would allow an enormous expenditure, both in conducting a bill through Parliament and in all the previous preliminary acts, which I cannot conceive to be in the contemplation of Parliament, though not positively prohibited by express enactment in the company's own Act. Then the law remains as before, as to whether or not money should be applied in a new speculation.

With regard to the plan devised here, the directors are not authorised by the preliminary meeting of the shareholders to raise the funds; they are not directed to advertise the new undertaking, or to take such proceedings as they think fit towards the new undertaking, and thereupon to collect subscriptions for that purpose. It was argued, that, if they might be promoters at all, they might, like any other promoters, acquire funds, and take charge of those funds, in any way which they found most expedient. But the resolution which is referred to as the basis of all future proceedings, is this:—"That, in contemplation of the passing of the bill for the construction of a railway from *Colne* to *Bradford*, this meeting doth authorise the directors to issue new shares, representing an additional capital not exceeding 800,000*l.*, such shares to be issued on the terms and conditions hereafter appearing;" and then it is resolved, that those new shares are to be guaranteed a dividend in preference to the ordinary stock of the company; and so it goes on, dealing with those shares as shares in the existing company, forming a portion of the existing capital, and saying what is to be done with them.

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 VANCE
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 Judgment.

All this is done, it is true, in anticipation of a new Act of Parliament. But I apprehend that it was a course of proceeding altogether irregular. It may not have been intended, perhaps, so to be; but it strikes me as being a very irregular course of proceeding on the part of the directors. They are not put forward as the servants and agents of the promoters of the proposed new line, and as authorised to receive subscriptions to that line, and to engage in inducing parties so to subscribe, that the Act to be applied for shall enact that all the shareholders in the new undertaking shall be deemed to be shareholders in the old undertaking, that the shares shall form part of the original stock, and shall have a preferential dividend of 5*l.* per cent. That, as it seems to me, would have been the regular and ordinary course of proceeding. In

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 —
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advertising to the public at large that they would become ipso facto the holders (on paying their deposit) of shares in this new company, and in simply telling them, you are about to apply for an Act, which Act will give them these preferential advantages, the subscription contract being in accordance therewith,—I apprehend that in all this, or in the directors guaranteeing that they will apply for an Act of this special description, there would be nothing wrong. But here the mode in which the thing is done is in strict pursuance of the resolutions, and in strict accordance with them, and that creates the difficulty. A letter is sent to each shareholder, it being amongst other things resolved, that the existing shareholders shall have the preference as to whether they will take these new shares or not. Pursuant to the resolutions, the directors appropriate twenty-seven new shares to the Plaintiff on his paying a deposit of 81*l.* thereon. That is to be paid into the bankers of the company, and then he is to be at liberty to sign the subscription contract. The shares will be guaranteed a preferential dividend of 5*l.* per cent., and so on, according to the terms of the resolution.

It does not seem to be mere form. If I thought it was a mere form, I would deal with it by undertaking rather than injunction; but it seems to me to be a matter of substance in this sense,—the directors agree to issue or allot certain things, which purport to be shares in an existing company, or shares giving to the allottees some right and interest in the existing company, whatever that may be, “in anticipation of the Act passing,” certainly; but still purporting to make them shareholders in this concern, which at present does not embrace the purpose contemplated by the *Colne* and *Bradford* extension.

It may be difficult at this moment to shew that any positive liability would be cast upon the Plaintiff, or any other

shareholder of the company, by issuing these specific shares; but that is a question which he may fairly say is not now to be mooted. If it merely went to the simple fact of having it announced in the share-market that there were shares of this description (which is an argument that I have not heard, but which occurred to my mind among other arguments), the very fact of the issue and existence of these shares in the market, treating them as shares in the existing company, of itself would be sufficient to justify the Plaintiff in saying, "I will not have my property dealt with in this way." But the broader ground which the Plaintiff may take is this—"I am a shareholder in a company which has nothing to do with the *Colne* and *Bradford* extension; you are acting as directors of my company, and you are not to put anybody in possession of documents, and tell those persons, that, on the faith of those documents, they are to be treated as shareholders in my railway; and that if a certain Act of Parliament should pass making them shareholders in a certain other railway, then they are to have a considerable advantage over me."

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Judgment.

I do not think that the Plaintiff would have any right to complain merely because such an Act of Parliament may be applied for. I do not follow Mr. *Rolt's* argument on that point. Directors have a right to apply for an extension of every power that Parliament may choose to give them, or whatever Parliament may think expedient for the company, on complying with the *Wharnccliffe* Order. But they have not a right to issue anything purporting or pretending on the face of it to be a share in this existing company, which, until Parliament has sanctioned the measure, has nothing whatever to do with the project in hand for its extension.

INJUNCTION to restrain the Defendants, the directors, their servants or agents, from applying, or causing or permitting to be

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Order.

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applied, any of the moneys, funds, or assets of the *East Lancashire* Railway Company, in or towards the promoting of any bill for a line from *Colne* to *Bradford*; and also from issuing or allotting, or permitting to be issued or allotted, any new shares purporting to be shares in the existing undertaking of the *East Lancashire*, except for the purposes and under the powers of any existing Act of Parliament, and from receiving any money in respect of such allotment.

Nov. 20th &
 Dec. 2nd.

BAINBRIGGE v. MOSS.

*Demurrer—
 Amendment—
 Costs of Suit
 —Orders of
 1828.*

The 20s. paid by the Plaintiff to a Defendant who has demurred, on obtaining leave to amend before the demurrer has been set down for argument, covers all the costs of preparing and filing such demurrer. But the costs of preparing a demurrer which was prepared but not filed before amendment, are costs of suit.

IN this case some of the Defendants filed a demurrer for want of parties, and for want of equity. Another Defendant prepared a demurrer; but before the former demurrer was set down for argument, and before the latter was filed, the Plaintiff obtained an order of course to amend his bill, upon the terms of his paying 20s. costs to the Defendants who had filed their demurrer.

Subsequently, the Defendants who had filed their demurrer, again demurred for want of equity; and the Defendant who had prepared but not filed his demurrer, also demurred; and, upon argument, both these demurrers were allowed, with costs.

The bills of costs brought before the Taxing Master, in addition to the other costs of the suit, included the costs of preparing the two demurrers to the original bill, and of filing the one which was filed; and to these items, among others, the Plaintiff carried in written objections before the Taxing Master; and, upon his overruling such objections, brought the question before the Court, upon a motion that the Taxing Master might be directed to review his certificate.

Mr. *Kay*, for the motion, contended, that the costs of the demurrer to the original bill which had been filed, had been paid by the 20s. He referred to the 15th Order of the 17th of November, 1635, made when Lord *Coventry* was Lord Keeper, the language of which seemed to support this view (a). The other demurrer had not been filed, but the costs allowed for it amounted to more than 20s.; and it would be hard that the Plaintiff should pay for this, at any rate more than 20s.

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Mr. *Cairns*, Q. C., for the Defendants who had filed a demurrer to the original bill, insisted, that the costs of preparing and filing such demurrer extra the 20s. ought to be allowed. He compared it to the case of an answer prepared, and rendered useless by amendment, the costs of preparing which would be costs of suit.

(a) The Order is as follows:—
“If the demurrer be grounded upon some error, slip, or mistaking in the bill, no reference thereof for a week after it comes in; but the Plaintiff, without any motion, shall be permitted of course to amend the said error, slip, or mistaking, paying to the Defendant or his attorney to his use costs, as the Six Clerks not towards the cause shall think fit*. But if the Plain-

tiff in that time do not amend or alter it, then, if the Defendant doth nothing therein within a week following, by getting it ruled or referred, it shall be disallowed of course without any motion, as put in for delay, and the Defendant shall pay ordinary costs. But if, the Plaintiff not amending it as aforesaid, it be ruled against him upon reference or otherwise, he shall pay the ordinary costs.”

* To this there is a note in *Beames's Orders*, edit. 1815, as follows:—

“The *Curs. Canc.* 208, recognises the rule laid down in this section, but fixes the costs at 20s. So, *Prac. Reg.* 164, adding, ‘But Plaintiff must now move to amend, and that before the de-

murrer is set down to be argued, otherwise, he must pay the costs the Defendant has been at in getting the order for setting down demurrer to be argued, and 20s. besides,’ referring to 1 *Harr.* 414 and *Jennings v. Pearce*, 1 *Ves. jun.* 44.”

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*Argument.*Mr. *Webster* for the other Defendant.Mr. *Kay* in reply.

[The VICE-CHANCELLOR said he would consult the Taxing Masters on the point.]

Dec. 2nd.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Judgment.

The question upon which I reserved my judgment in this case was, how far the costs of the original demurrer that was filed could be allowed, there having been an amendment of the bill before it was set down, and 20s. costs having been then paid. The Taxing Master has certified, that the extra costs of preparing and filing the demurrer were costs of suit. I find, upon inquiry of the Taxing Masters, that the case is so unusual, that only one instance has been discovered, and in that instance the claim to the extra costs of the demurrer was disallowed. I think that such extra costs are not properly costs of suit; because I find that the Orders of the Court, throughout, draw a distinction between them, particularly the Order of Lord *Lyndhurst*, 45th Order of May, 1845, which directs, that, where a demurrer is allowed, the costs of the suit shall be paid. The Taxing Master, who disallowed the extra costs in the case I have mentioned, called my attention to the 29th Order of 1828. I confess, it appears to me on consideration, although it seems manifest from the frame of those Orders, the 28th, 29th, 30th, 31st, and 32nd, to have been the intention to give full indemnity to the demurring party when costs were allowed him, that unfortunately this case does not fall within them. I say unfortunately, because I think that justice demands that it should be otherwise. The 29th Order provides, "That where the Plaintiff is directed to pay to the Defendant the costs of the suit, there the costs occasioned to a Defendant by any

amendment of the bill, shall be deemed to be part of such Defendant's costs in the cause, (except as to any amendment which may have been made with special leave of the Court, or which shall appear to have been rendered necessary by the default of such Defendant); but there shall be deducted from such costs any sum or sums which may have been paid by the Plaintiff, according to the course of the Court, at the time of any amendment."

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 Judgment.

That accounts for the practice to which Mr. *Cairns* referred, of an amendment after a Defendant had prepared his answer, and the costs of the original answer being allowed, because these are in truth costs of suit; but it is difficult to say, that the costs incurred before amendment in preparing to demur, were occasioned by the amendment; they are costs of proceedings, which were rendered useless by the amendment, not occasioned by it. There was a purpose for which those words were inserted. The Plaintiff might make considerable amendments, which would make it necessary to take out a fresh copy of the bill; and the intention of these orders was to put the party, who had to receive 20s. and the other conventional payments, in the same situation of indemnity as he was in with reference to the other costs of the suit. I think that this particular case has been overlooked, and I am obliged to disallow the extra costs of the demurrer which was filed.

With respect to the demurrer which was not filed, there has been no payment to the Defendant who was at the expense of preparing it, and I think that the costs of so preparing it may be allowed to him.

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Dec. 11th. **MILLS v. THE MASTER, WARDENS, AND SOCIETY OF THE MYSTERY OF BOWYERS, IN THE CITY OF LONDON.**

THE MASTER &c. OF THE MYSTERY OF BOWYERS, &c. v. MILLS.

Arbitration—Correcting Award—Evidence—Common Law Procedure Act, 1854, s. 8.

THE first cause was for specific performance of an agreement to grant a lease for fourteen years, and for an injunction to restrain an action of ejectment by the landlords. The cross suit was to restrain breaches by the tenant of the provisions of the agreement under which he held.

Upon a motion to set aside an award, or to refer it back to the arbitrators, the Court will receive evidence by affidavit.

Pending a reference to arbitration, the umpire held a communication with the agents of one of the parties: this fact being known to all the parties at the time, and

not objected to by any of them, and the reference having proceeded, and the award having been subsequently made:—*Held*, that it was too late for either of the parties, after the award was made, to object to it, on the ground of such communication between the umpire and the agents of one of them.

The 8th section of the Common Law Procedure Act, 1854, does not authorise the Court to send back the award for reconsideration by the arbitrators on any ground except such as before that statute would have induced it to set aside the award, or to treat it as a nullity in an action brought upon it.

The object of that section was, where any error, formal or otherwise, had occurred which would vitiate the award, to enable the Court to send it back, if they thought fit, to the arbitrators to correct such error, instead of setting the award wholly aside.

If a mistake has been made in the award, not apparent on the face of it, and such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorise the Court to set aside the award under the former practice, or to refer it back under that statute. So also, if the arbitrators insist that they have made no mistake, but state the principle upon which they made the award, and the Court is of opinion that such principle is not consistent with the reference.

according to the custom of the country, in other respects than such as were provided for by his lease: It was ordered, by consent, that such payments should be made accordingly, and that the amount thereof should be determined by arbitration; and two persons, named in the order, were appointed arbitrators; and it was ordered, that the reserved rent and interest, rates and taxes, apportioned to the day of possession delivered, and the amount, if any, that might be awarded for any damage done to the farms by *Mills*, and any costs awarded to be paid by him to the company, should be set off against any payment coming to him from them. And all proceedings in the suits were stayed, except the carrying out this order; and liberty was given to any party to apply.

The arbitrators met, chose an umpire, and one of them with the umpire, the other arbitrator dissenting, made an award; and thereby ordered, that the amount of the allowances and payments to be paid by *Mills* to the Company for damage done to the farms by *Mills*, having regard to his holding under the four-course system, and, in other respects, under the terms of his lease, was the sum of 50*l*. And that the amount of the payments and allowances to be paid to *Mills* by the Company for the tenant's improvements, crops, and usual allowances, was the sum of 1775*l*. 10*s*. 5*d*.; and that each party should pay their own costs of the arbitration, and half the costs of the award.

This was a motion by *Mills* to refer back to the arbitrators the question of the value of certain specified crops on the farms, and for a declaration that such crops ought to be estimated at their value as growing crops at the date of the award; and, if necessary, that the award might be in part or wholly set aside.

Affidavits were filed on both sides, shewing the principle on which the valuations had been made. It is sufficient for

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the present purpose to state, that the grounds of *Mills's* objections were, first, that the umpire had improperly held communications with some of the agents of the company; and secondly, that the principle of the valuation was wrong, because *Mills* had been treated thereby as a tenant from year to year whose tenancy would expire at Lady-day, and, according to the custom of the country applicable to such a tenancy, he had only been allowed in his valuation the value of the crops of fallow wheat as "growing crops," and for all other crops only the value of the seed and labour; whereas *Mills* contended, that all the crops should have been valued as growing crops.

It appeared, that the umpire told the parties assembled at the investigation, that he would just go and ask a question of the Company's agents, who were then in the neighbourhood, concerning the improvements; and that he went accordingly. It was stated in an affidavit, filed on behalf of the Company, that the answer to the umpire's inquiry was, that it was the wish of the Company that *Mills* should have the benefit of any doubt that might arise as to any allowances to be made to him.

As to the valuations, the umpire, by his affidavit, stated, that the farms had been cropped not according to the four-course system, but contrary to it and to good husbandry, too much wheat having been sown, not sufficient land being fallow, and no grass or clover having been sown; whereas, one quarter of the farm should have been then laid down in grass and clover; and that this course of treatment had caused great injury to the farm; moreover, *Mills* had not provided sufficient manure for the land. And he thus explained the award:—

For all the corn crops in proper course of cultivation, and which therefore properly were *Mills's*, he was allowed the

full value thereof, deducting only the costs of harvesting, threshing, marketing, and a portion of the rent for bringing the crops to maturity. And for the corn crops out of course or over-cropped, and which he had improperly sown, I had regard to the custom of the country, and to the loss and injury occasioned to the farm by such improper course of cultivation as aforesaid, and to the want of proper clearing of the land, and to the expense of bringing the farms round again to the proper course of cultivation, as well as to the seed and labour employed by *Mills* on the land which he ought not so to have cropped; and we did not value such crops by reference to the cost of seed and labour alone, apart from such other considerations as aforesaid; and the said *Mills* was allowed for the brush wheat, and other crops so out of course as aforesaid, and for fallows, a rebate of rent of ample amount, as well as full allowance for lime and a proportion of the linseed oil cake, in addition to seed and labour, to which alone, by the custom of the country under similar circumstances, he would have been strictly entitled. The loss and injury to the farms by over-cropping and cross-cropping were, in fact, estimated and compensated for in the valuation of the crops of brush wheat, barley, oats, beans, and tares, and no part of the loss or injury arising from such causes was included in the amount at which damages, properly so called, were valued, and which included only dilapidations to fences and buildings, and the want of manure, occasioned by the neglect of the said *Mills* in not converting last year's produce into manure.

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Mr. Cairns, Q. C., and Mr. Bovill, for *Mills*.

Argument.

Mr. Rolt, Q. C., and Mr. Greene, for the company, objected to reading any affidavits to impeach the award, citing *Sharman v. Bell* (a), and *Phillips v. Evans* (b).

(a) 5 M. & S. 504.

(b) 12 M. & W. 309.

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[The VICE-CHANCELLOR referred to *Fuller v. Fenwick* (a) and *Hutchinson v. Shepperton* (b), and said, that the cases seemed to shew that affidavits were allowed to be read on such applications, and that he could not exclude them.]

Mr. Cairns, Q.C., and Mr. Bovill:—

This award is impeached not on account of any mistake of law or fact, but because the arbitrators have not followed the order of the Court. Courts of equity will set aside awards, where there is an obvious error of this kind, more easily than Courts of law: *Russell* on Awards, p. 304; *Ward v. Dean* (c), *Robson v. Railston* (d). By the Common Law Procedure Act, 1854, s. 8, the Court now has an extended power of setting aside awards (e).

Then the communication between the umpire and the agents of the *Bowyers' Company* was improper.

[The VICE-CHANCELLOR intimated that he did not require to hear the Defendants' counsel on the last point.]

Mr. Rolt, Q.C., and Mr. Greene, for the Company.

The reply was not called for.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I regret to say, that I think the award must go back to the arbitrators.

(a) 3 C. B. 705.

(b) 13 Q. B. 955.

(c) 3 B. & Ad. 234.

(d) 1 B. & Ad. 723.

(e) The terms of this section are, "In any case where reference shall be made to arbitration as aforesaid, the Court or a judge shall have power at any time,

and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or judge shall seem proper."

I have disposed, without hearing Mr. *Rolt*, of the objection to the award, which depended upon the alleged communications between the umpire and some of the agents of the *Bowyers' Company*. It appears, that the only communication that ever was held between the umpire and the company's agents, was so held with the full knowledge at the time of the Plaintiff and his advisers. His advisers at least, if not the Plaintiff himself, were perfectly aware at the time that the umpire was going to see some of the parties, and to ask a certain question; and neither the Plaintiff nor his advisers made any objection. The umpire came back, having seen those persons, whom, he said openly before all parties, he was about to communicate with, and no objection was made; and I think it is much too late now to come forward and take any objection, on that ground, to the award. The communication, on the part of the company, seems to have been simply a communication in favour of the Plaintiff, that they wished every possible indulgence and liberality to be shewn to him.

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I accede to the view, that it would be a great deal too dangerous to allow any arbitrator, or any umpire, to have communications with some of the parties without the knowledge of the other parties to the reference, and then to say, that he was not influenced by anything which took place. But in this case it appears, that the only thing that took place was one which every person knew of at the time, and they allowed the reference to proceed without making any objection.

I come, then, to the main part of the case, which is with regard to the alleged error on the part of the arbitrators. I confess I open this award with extreme reluctance, because it appears to me, that the 8th section of the Common Law Procedure Act, 1854, in no way authorises any such course of proceeding as that which I understood was endeavoured

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to be pressed on the Court in the argument of this case. It does not appear that there is anything in that statute that would authorise the Court to send back an award for the reconsideration of the arbitrators, upon any other grounds than those which have hitherto prevailed to invalidate an award. I apprehend that the 8th section, if it were supposed to have any such construction, would be the most mischievous alteration of the law which could be conceived, and would have the operation of entirely arresting all references to arbitration; for, who would submit to these references, if, after the parties had themselves selected their judges, who were to make a final award of the matters in difference between them, that final award and determination might be opened upon every consideration which might be stated as to its justice or expediency on the part of any of those who had so selected their tribunal. This 8th section is nothing more or less, as it appears to me, looking back to the history of what took place before the passing of the Act, than the introduction of a statutory enactment enabling the Court to do that, which experience had shewn it was convenient it should have the power of doing, and which had frequently before been specially provided in orders of reference by the Court, and in submissions by consent between the parties, namely, that there should be a special power in the Court to remit the matters in question, or any of them, to the consideration of arbitrators, rather than set the whole award aside. That was the ground of this clause being introduced. Formerly, the Court was often put under great difficulty in having to do one of two things, neither of which was consistent with the dignified administration of justice. On the one hand, the Court was often put in the position of saying, there is a great mistake in this matter—or, we see that there is a very small mistake, perhaps a mistake in the Christian name of the Plaintiff, or some error in the heading of the cause, or something of that description—we have only one course open to us, we cannot correct

the mistake, or send it back to the arbitrator to be corrected by him, he has no authority over it, all we can do is to set aside the award. Or, the other course was, if the Court conceived the award was one which they could not set aside, yet, still, upon an action brought on the award, they seem occasionally to have thought themselves at liberty to disregard the award upon other grounds than those they could have acted upon when they were applied to to set it aside; and they have thus allowed the award to become ineffective. Both those courses were extremely objectionable, and this clause appears to me intended solely for the purpose of enabling the Court, in certain clear cases of mistake, to act partially on the award. and remit it, either as to the whole or any part of the matters, to the arbitrator to correct a clear mistake.

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I do not find among the authorities any case in which an award has been so dealt with, either before or since the statute—whether the provision I have referred to was contained in the submission or not, I do not find any case in which the Court has gone behind the award, except where there has been an admitted mistake on the part of the arbitrators; and, when I say admitted mistake, if I am not in error, all the authorities cited this morning are to this effect, that it must be a mistake admitted by the arbitrators themselves. I have not yet found an authority in which the parties litigant have been allowed to go into the proceedings of arbitrators in any other respect; except it be the misconduct of the arbitrators in dealing with the matters submitted to their reference.

Now, in two cases cited, that of *Robson v. Railston* (a) and *Hutchinson v. Shepperton* (b), the arbitrators admitting, by affidavit, the mistake they had made, the Court

(a) 1 B. & Ad. 723.

(b) 13 Q. B. 955.

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thought itself at liberty, notwithstanding some very strong dicta to the contrary in some cases before the Exchequer, to send the matter for the reconsideration of the arbitrator, or to set the award aside. In this case, I think, I have an admission on the part of the arbitrators, that there has been this mistake; because I do not think it requisite that the arbitrator should admit, in terms, that he had made a mistake; but it is sufficient if he should admit circumstances from which the Court sees plainly that the proceedings have been erroneous; because, if the arbitrator has taken an erroneous view—I mean erroneous not as to his mode of arriving at the truth of matters referred to him, but if he admits those facts which shew that he has acted on an erroneous construction of the order or submission by which the matters in question were referred to him—then I think the Court must deal with it as a mistake on the part of the arbitrator in his conduct of the reference submitted to his adjudication.

Now, to make it plain, I will say at once on this part of the case, that if it appeared that the valuation of the crops in question, which have been cross-cropped contrary to the custom of the country, had been made upon the principle and in the mode described on behalf of the company, and that the arbitrators conceived this to be the proper mode of arriving at the value of such crops, according to the words of the order, namely, that the tenant should be paid for the value of his growing crops, I could not have interfered, whether I thought the principle erroneous or not. It would have been beyond my control if the arbitrators thought that the proper mode of arriving at a valuation of the crops was by valuing the seed, the labour, the rent, the quantity of manure, lime, and a certain allowance for oilcake, instead of taking the market price and making a deduction, and had said, merely, we consider, in our judgment, that to be a proper mode of getting at the value of the crops—I should

have said I was bound by that, and it was impossible for me, everything being correct on the face of the award, to say that there had been any error which I could deal with. But it does not stand so upon the circumstances of this case, because the arbitrators have said, we have valued two sets of crops in two entirely different ways. Their statement is plainly—we have valued one set of growing crops according to the market price, deducting the expense of threshing and the like, making some allowances in respect of rent, and so on; and we have valued another set of growing crops upon another principle: and there I think is the error, because there is nothing here, on the face of the order, which authorises them to make two separate valuations of the growing crops of different characters. It does not stop here; possibly it might be said upon this, however strange it might appear, that two sets of growing crops, which had been directed to be valued, had been valued upon totally different principles, yet the Court might still be obliged to say, the arbitrators must take their own course however fantastic it may be; and if they choose to say they have valued one set of crops on one principle, and another set on another, the Court cannot interfere. But it is stated plainly in the affidavit of the gentlemen who made this award, and who I have no doubt meant to act with the utmost fairness, that the umpire had regard, in valuing these particular crops, to the custom of the country, and to the loss and injury occasioned to the farm by the improper course of cultivation, and to the want of proper cleansing of the land, and to the expense of bringing the farm round again to a proper course of cultivation. It is impossible to say that this is any valuation of the crops at all. It would not be a valuation of the crops in any case, but more especially not in this case, where the previous part of the order directs that the arbitrators shall value separately those things which they say they mentally deducted in valuing the crops. The order provides plainly,

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that the Society of *Bowyers* are to be paid for any damage done to the farms by *Mills*, having regard to his holding on the four-course system of husbandry; but in the valuation of the crops, they have allowed the very thing which the previous part of the order pointed to as a matter to be valued separately, by a definite estimate, and paid for to the *Bowyers' Company*. Then the arbitrators are directed separately to estimate and allow to *Mills* the value of his growing crops, and when you take those two things together, it is impossible to construe this order in any other manner than that there are two things to be done. They are to make two distinct sums, the one the sum which is coming to the *Bowyers' Company* in respect of all the damage done in consequence of improper cultivation, and also the expense of putting the farm back into a proper state of cultivation; all that is included in the first estimate of damage. And then *Mills* is to have, on his part, the value of his growing crops; so that the parties to this consent order, admitting that at least there was a question of injury to the farm in respect of this course of cropping, have agreed, nevertheless, that *Mills* was to pay for the injury, but should be allowed the value of his growing crops. That seems to me to be plainly the purport of the order, and as it is admitted on the face of the arbitrators' affidavits (which are the only affidavits I look to), that they have not, on the one hand, ascertained what is to be paid by *Mills* for damage; nor, on the other hand, given him the value of the growing crops, but have found the value of the growing crops on a totally different footing; and have, in their own minds, made a deduction for damage which is included in effect in and ought to have been valued under the direction given in a previous part of the order, as to what shall be paid to the *Bowyers' Company*; and, as the arbitrators say in a subsequent part of their affidavit, that, in the payment of 50*l.* which they have awarded for damages to the *Bowyers' Company*, they did not include anything in respect of

cross-cropping or improper cultivation, but only the payment due in respect of hedges, and the like, the result is, that, though 50*l.* has been awarded for all damage done to the company under the order on the one hand, and so much for the value of the crops on the other hand, the arbitrators themselves say that this 50*l.* does not include a considerable portion of the damage done to the company; nor does the value put upon the crops include their whole value, because it is only the value taken in a very peculiar way, and less the amount of the damage done. Therefore, as this is plainly stated by the arbitrator's own affidavit, and only on that ground, on the authority of those two cases of *Robson v. Railston* (a), and the later case of *Hutchinson v. Shepper-ton* (b), feeling that I have before me an admitted error by the arbitrators on both sides of the account, I think I am bound to remit it back for reconsideration; and the proper order to make will be, following the terms as nearly as possible of the Act of Parliament, to remit it back to the same arbitrators and umpire, to reconsider and redetermine the several matters referred to them for their consideration and determination by the order of the 2nd of July, 1856. I do not think it is necessary now to direct that the award shall be made in any given time; the right course will be, that either of the parties to the suit shall be at liberty to apply; and I will reserve the consideration of the costs till after the award shall be made.

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(a) 1 B. & Ad. 723.

(b) 13 Q. B. 955.

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*Dec. 12th,
13th, & 15th.*

JENNINGS v. BADDELEY.

*Jurisdiction—
Partnership—
Dissolution.*

This Court has jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital; and it is not necessary to shew that the concern is embarrassed.

Dissolution of a partnership decreed on that ground in a case involving other and special circumstances, on which, however, the Court did not rely as essential to the decree.

IN January, 1853, the Plaintiff, having agreed to enter into a partnership with the Defendant in working certain coal and iron mines, to which the Defendant was entitled in fee, subject to large mortgage debts, took a lease of the mines from the mortgagees for a term of fifty years, the Defendant joining in the lease in respect of his equity of redemption. The lease contained a power for the Plaintiff to determine it by surrender, at any time during the term, in case it should appear that the mines could not be worked at a profit.

In July following, articles of partnership, to take effect as from the 1st of January in the same year, were executed by the Plaintiff and Defendant, whereby, after reciting the title of the Defendant to the equity of redemption of the demised premises, and the grant of the lease to the Plaintiff, and that the Defendant had been at a considerable expense in sinking the shafts, and proving and preparing the mines for being worked, and in the purchase of and erecting the machinery then upon the premises, the Plaintiff and Defendant agreed jointly to work the mines upon the following (amongst others) terms and conditions:—

1st. That the machinery, cost of sinking the pits and other works, stock in trade, and trade implements and effects, belonging to the Defendant, should be considered of the value of 3000*l*.

2ndly. That the Plaintiff should provide the sum of 3000*l*., less a sum of 612*l*. 14*s*. 6*d*. then due to him from the Defendant; the balance to be applied exclusively for the

purposes of his mines, except as to a loan of 300*l.* to the Defendant, to be repaid by him by instalments, with interest at 5*l.* per cent. ; and all payments then already made by the Plaintiff for the purposes of the mines to be treated as in part or the whole of such balance, as the case might be.

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3rdly. That the arrangement should continue in force until the mines were worked out, or the lease determined by any means.

4thly. That if either of the parties should put into the concern any further capital, he should be allowed interest thereon at the rate of 8*l.* per cent. per annum ; and such further capital and interest should be considered as a debt due by the concern to the party advancing the same, and should be repayable at any time on demand.

The articles of partnership contained also several stringent provisions for the protection of the Plaintiff, in the event of the Defendant's share in the partnership property being attached, taken in execution, or otherwise impounded by his creditors.

In pursuance of the articles, the Plaintiff brought into the concern the 3000*l.* less the 612*l.* 14*s.* 6*d.*, and the business was commenced.

The concern proved unproductive, and further sums were from time to time required, and were advanced by the Plaintiff for carrying it on. At the hearing of the cause, the sums so advanced amounted to 25,000*l.*, which sum, together with the loan of 300*l.*, remained due to the capital of the concern.

The mines still remained unremunerative, producing but two-fifths of the dead rent in coal, and one-twelfth in iron.

Under these circumstances, the Plaintiff filed his bill,

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charging, that the rents of the mines were excessive; that the covenants and conditions of the lease were very burdensome, and rendered the working of the mines, at the sole expense of the Plaintiff, a source of great loss and injury, in respect whereof the Defendant was wholly unable to render any indemnity according to the just proportion of his liabilities in that behalf; and praying that the partnership might be dissolved.

Evidence was adduced on the part of the Defendant, with a view of shewing that the failure of the mines was owing to extravagant expenditure of capital, and imprudent and unskilful working of the mines; that the Plaintiff alone was responsible for such failure, and that the mines were still capable of being worked at a profit:—points which, as will be seen from the judgment, were not made out to the satisfaction of the Court.

Argument.
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Mr. Rolt, Q. C., and Mr. Prendergast, now moved for a decree as prayed by the bill.

They contended, that, taking into account the rent to become due for the mines, the interest on additional capital already advanced under the 4th clause of the articles of partnership, and the expenses incidental to the future working of the mines, it was clear that they could not be worked at a profit, or at any rate that they could not be so worked without further capital; and for raising further capital the partnership articles made no provision. The Plaintiff, therefore, was entitled to the relief sought, on the broad principle that profit is the end and object of every partnership; and where profit is no longer possible, the Court will decree a dissolution;—a principle on which the Court had lately acted in more than one unreported case.

They cited *Reeve v. Parkins* (a) to shew, that, where a partnership contains in itself the seeds of dissolution, the Court will interfere to relieve either party from the consequences of their want of foresight.

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Mr. Cairns, Q. C., and Mr. Speed, for the Defendant, denied that the Court had ever gone so far as to decree the dissolution of a partnership, merely on the ground of its being impossible to carry on the business at a profit. It was necessary to shew, either that the object of the partnership had entirely failed, or that one of the partners had committed a breach of the partnership articles, otherwise the Court had not jurisdiction.

[The VICE-CHANCELLOR referred to *Baring v. Dix* (b)].

There the invention had failed, and the business was given up.

Besides, the evidence shews that these mines can now be, and always could have been worked at a profit, and that their failure hitherto is attributable to extravagant expenditure and injudicious management on the part of the Plaintiff—circumstances which alone would preclude him from asking this relief.

Independent of these reasons, the lease contains a power for the Plaintiff to determine it by surrender, in case it should appear that the mines cannot be worked at a profit; and upon his so determining the lease, by the 3rd clause of the partnership articles, the partnership would cease of its own accord; so that he is in this dilemma, that if, as he contends, the mines cannot be worked at a profit, he has his remedy in his own hands; if they can, his case for relief in this Court is at an end.

(a) 2 J. & W. 390.

(b) 1 Cox, 213.

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The true nature of this agreement is, that the Plaintiff, with his eyes open to all the circumstances, and also (as is plain from the extraordinary provisions of the partnership articles on that subject,) to the desperate position of the Defendant, undertakes, in consideration of the Defendant procuring him a lease of the mines for fifty years, to work the mines to the full end of that term, and to find all the requisite capital.

A reply was not heard.

Judgment.
 ———

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If the agreement in this case had been such as it was described by Mr. *Cairns* at the close of his argument—an agreement by which the Plaintiff, in consideration of the Defendant's procuring for him a lease of the premises for a term of fifty years, undertook to work the mines during the whole of that term, the case would assume a different aspect; but that is not the nature of the agreement between the parties. Had such been the nature of the agreement, the lease would have contained a covenant on the part of the Plaintiff, to work the mines for the entire term. But the lease contains no such covenant. Neither in the lease, nor in the articles of partnership, is there any undertaking on the part of the Plaintiff beyond this: that the Defendant's works, stock in trade, and trade effects, being taken at 3000*l.*, the Plaintiff is to contribute a like sum of 3000*l.*, (and even that is subject to the deductions mentioned in the 2nd clause of the partnership articles); and the case is simply one in which one of two persons, who are about to enter into a partnership in working certain mines, takes, in trust for the partnership, a lease of the mines for fifty years, both expecting to be able to work the mines at a profit during the entire term, with the amount of capital which I have mentioned. That is the simple case, although there are

also some very special circumstances connected with it, to which I shall have occasion to refer.

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It was argued, that, admitting the circumstances under which the partnership was entered into, to have been of this simple character, still, although it might be clear to the Court, that, from the circumstance of the partners having bound themselves to pay an exorbitant rent for the premises on which the partnership business is to be carried on, such business could not possibly be carried on at a profit, the Court, even in that case, would have no jurisdiction whatever to order a dissolution of the partnership. I very much doubt that proposition, although I do not think it necessary to treat the case before me as depending on the question, whether that proposition, pure and simple, can be maintained. The doctrine of this Court has always been, that expectation of profit is implied in every partnership; that every partnership is entered into by the partners with the view of deriving profit from the concern. No one can suppose that persons, who have agreed to carry on a business for a certain term, will continue to carry it on during as many years as the term may have to run, when it is clear that, during the residue of the term, they must be working at a certain loss. Whether, in this case, the certainty of loss is, or is not, made out, is a question which I am not yet discussing; but to hold that, because a partnership has been entered into for a fixed term of years, the business must be carried on to the full end of that term at a certain loss to the partners, would be to introduce a principle not only unknown to this Court, but opposed to a doctrine which I find expressly laid down in a case before Lord *Kenyon*, as Master of the Rolls—the case of *Baring v. Dix* (a), and acted upon by Vice-Chancellor *Shadwell* in another case (merely shortly stated),—that of *Bailey v. Ford* (b).

(a) 1 Cox, 212.

(b) 13 Sim. 495.

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In *Baring v. Dix*, the bill was filed by two partners against a third, praying, that the partnership might be dissolved, and that leasehold premises, on which the trade was carried on, might be sold. It appeared that the partnership had been originally instituted for the purpose of spinning cotton under a patent, but that, after several attempts, the invention failed, and was then entirely given up. The Defendant refused to consent to the dissolution of the partnership, or the sale of the leasehold premises, notwithstanding it appeared that the mills must otherwise remain wholly unoccupied, and the rent be payable, *without any profit arising to answer it*. The report proceeds thus:—“The counsel for the Plaintiffs apprehended, that they could not insist upon the dissolution of the partnership, or the sale of the premises, against the consent of the Defendant: but his Honour ordered, that, upon the Defendant’s refusing to concur in the sale of the premises and the dissolution of the copartnership, it should be referred to the Master to inquire and state to the Court, whether the said copartnership business could now be carried on according to the true intent and meaning of the said articles of copartnership. And his Honour declared, that, if it could not be so carried on, he would direct the premises to be sold, and would dissolve the copartnership.” The reporter adds, in a note, that the Defendant afterwards signified his consent to the dissolution. But there was an actual decree made, before the Defendant consented; and the Court declared, before his consent was given, that it would dissolve the partnership if the Master should report that the business of the partnership could not be carried on according to the true intent and meaning of the articles of partnership. And by those words the Court must be taken to have meant “carried on so as to produce a profit,” since there could be no physical impossibility in carrying on cotton spinning, which was the business of that partnership—with a sufficient supply of capital, it must always be physically possible to carry on the

business of a partnership for the manufacture of that article or any other.

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The analogy of that case to the present appears to me to be this:—here, if no additional capital be found—and if the Plaintiff do not find it, no such additional capital will be found,—the mines must cease to be worked, the parties not being able to work them at a profit; and that being the case, according to *Baring v. Dia*, the Court would make a decree for the dissolution of the partnership, as a matter of course.

But, before looking more minutely into the circumstances of the present case, I wish to refer to that of *Bailey v. Ford* (a). There, the object of the suit was, to put an end to a partnership in the business of a chemist and druggist, which had existed between the parties since some time in 1839, and was intended to continue for twenty-one years. It appeared that the partnership was insolvent, and that its embarrassments were daily increasing. Under those circumstances, it was moved on behalf of the Plaintiff, that a proper person might be appointed to sell the business, to collect the debts, and to satisfy the demands upon the partnership. It was objected, for the Defendant, that this was in effect asking the Court to do on motion what could not be done except at the hearing of the cause—namely, to put an end to the partnership. The Vice-Chancellor said, “Although the general rule is, that the Court will not grant on motion that relief which ought to be granted at the hearing, yet it will do so in some cases. It appears, that the affairs of the partnership are daily growing worse; and there is no reason to infer, from what is stated in the Defendant’s answer, that they will ever improve. Under those circumstances, I shall make an order in the terms of the notice of

(a) 13 Sim. 495.

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motion." In other words, because there was not sufficient capital for carrying on the business at a profit, the partnership was dissolved, the debts were ordered to be paid, and the business was put an end to.

[His Honour then examined more minutely the circumstances of the present case. He had no doubt of the bonafides of the Defendant. It was clear, that, in entering into the original arrangement with the Plaintiff, the Defendant believed the prospects of the mine to be as good as they were represented to the Plaintiff. It was clear, also, that the Defendant had made to the Plaintiff a full disclosure of his own embarrassed circumstances, and that no further advance of capital could be expected from him. But the evidence shewed, and indeed the Defendant himself deposed, that, at the time of entering into the agreement, both Plaintiff and Defendant alike believed that 1200*l.* would be sufficient capital for the Plaintiff to advance for carrying on the business. This, and such other sum (if any) as might be required, in addition to the sums mentioned in the 2nd clause of the partnership articles, to make up the sum of 3000*l.*, the Plaintiff was to advance as his share of the capital; and by another clause it was expressly provided, that, if any further capital was put by the Plaintiff into the concern, he should be allowed interest thereon at 8*l.* per cent., instead of 5*l.* per cent., (the rate more usual between partners), and such further capital and interest should be considered as a debt due to him by the concern, and be repayable at any time on demand. That being the agreement between the parties, and the understanding upon which the partnership was entered into, the business of the partnership was commenced; and it then turned out, that, instead of 3000*l.* being sufficient, 25,000*l.* had been expended by the Plaintiff, and had not rendered the mines remunerative; not only so, but for the two years during which they had been raising at the rate of 6000*l.* per

annum, the parties had not raised sufficient to be equal in tonnage to the dead rent, the mines having produced but two-fifths of the dead rent in coal, and one-twelfth in iron. Under these circumstances, the onus clearly lay with the Defendant to shew, that there was any probability of the business being carried on for the future so as to realise a profit. This he had endeavoured to do, by objecting to the expenditure as extravagant. And, had he shewn that there was, in this respect, any mala fides on the part of the Plaintiff, and that the failure of the mines had resulted from any misconduct on the part of the Plaintiff, and that, by removing the Plaintiff and introducing some other person who would conduct the business bonâ fide and in a proper manner, it could be carried on profitably, he would have advanced a considerable way towards making out his contention, that the Plaintiff was estopped from asking the relief prayed by his bill. But this he had failed to shew; and if mismanagement there had been, which it was not necessary for the Court to determine, it was clear that the Defendant, equally with the Plaintiff, had allowed and was responsible for such mismanagement. As far as bona fides was concerned, there was at least as much bona fides in the Plaintiff who had expended 25,000*l.* upon the Defendant's property, as in the Defendant who had allowed him to expend that sum. The fact remained, that, 25,000*l.* having been so spent, the result was, that two-fifths of the dead rent in coal, and one-twelfth in iron, was all that had been raised. This being the present condition of the mine, and the partners being in such a position that neither of them was under any obligation to make any further advance towards the capital of the concern, the Court was left to judge whether the object of working the mine at a profit could, under those circumstances, be realised. And it was perfectly clear that it could not. It had been argued, that there was no knowing what valuable mines these might prove, if the parties only set about working them properly; but, after

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carefully examining all the evidence, the Court had not found that any single witness had ventured to say, that, taking into account every existing charge on the property, the charge for money expended, the charge for rent, and the expenditure of working, there was any chance whatever of the concern being worked at a profit.]

Then, if this concern cannot be worked at a profit, I consider the case as falling within the authority of *Baring v. Dix* and *Bailey v. Ford*; and, indeed, it would almost seem that nothing more than common sense is required to lead to the conclusion, that, in a common case of partnership, formed, as all partnerships must be, for the purpose of an effectual working at a profit, you cannot force the partners to continue the copartnership, when it is clearly made out that the business is no longer capable of being carried on at a profit. The question, whether or not the concern is embarrassed, cannot make any difference. That may depend on whether one of the partners is rich, as is the case here. The real question is whether, in a fair mode of proceeding, each partner contributing his usual share to the capital of the concern, the matter can be worked so as to enable the concern to go on with the object which both parties have in view.

Up to this moment, I have not made any comment on the position of the Defendant in this suit; but, certainly, if I did not consider myself, as I do consider myself, entitled to hold, on general principles, that the Plaintiff is entitled to have this partnership dissolved, the position of the Defendant would make the case one in which the Court would endeavour to find its way to granting the relief that is asked. I perfectly agree, that the circumstances of the Defendant were known to the Plaintiff when he entered into this agreement, but the supervening circumstance was not known or conjectured;—no one knew or conjectured that

anything like 28,000*l.* would be required for carrying on the concern. And the Defendant's position is this: for every year that the business is carried on, he receives half his rent,—payment to his mortgagee being payment to him, and his contest, therefore, in fact is this: 'I am entitled to receive, out of the pocket of my partner, half the rent of this property, which is worthless;—I have a right to continue the partnership, in order that my partner may be bound to pay the rent, that partner being my tenant, and the rent going into my pocket.' I cannot conceive that a partner who is unable to perform any part of his share of the engagements, who is utterly unable to recoup to his copartner one half of what he may advance to carry on the concern, can contend, that, for the mere sake of paying the rent of the property, the partnership is to be carried on by the copartner who alone has any money to enable it to be carried on at all, and that it is to be so carried on without any result, except such as I have described.

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I have one more observation to make in reference to the argument, that, if the Plaintiff finds he cannot work the mines at a profit, he is entitled to put an end to the lease. I apprehend he is under no obligation to take that course. A variety of observations might apply as between the Plaintiff and the mortgagees, which would not apply as between the Plaintiff and his copartner. The mortgagees may be entitled to say, that the mine has been badly worked, and that they are not to be charged with any portion of the 25,000*l.* in calculating whether the mines can be worked at a profit. The Defendant is in a totally different position. He had all the facts before him when estimating whether the mine could be properly worked with the capital proposed; he has participated in everything that has since been done in the working of the mines; and as between the Defendant and his copartner, it is most material to take into calculation the amount of capital expended in the concern,

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and whether it is possible for the mines to be carried on with that amount, so as to answer the purpose for which all partnerships are entered into, viz. the realisation of profit.

It seems to me, that the whole purpose of this partnership has failed, and that the Plaintiff is now entitled to have it dissolved by the decree of this Court.

There must be the common decree for a dissolution; and, under the peculiar circumstances of the case, there may be a special inquiry whether any and what steps should be taken in respect of the lease.

Decree accordingly.

Dec. 4th & 8th.

HOLMES v. PENNEY.

*Fraudulent
Settlement—
13 Eliz. c. 5—
Subsequent
Creditors—Parties—Assignee—Husband and Wife.*

THIS was a bill by a person claiming as creditor and assignee in insolvency of one *C. J. Penney*, to impeach a

Creditors—Parties—Assignee—Husband and Wife.

A settlement, for valuable consideration, made with the intention of defrauding creditors, is void under 13 Eliz. c. 5.

The mere fact of a settlement being voluntary is not sufficient to render it void against creditors; but if the settlor was at the time of making the settlement—not necessarily insolvent—but so largely indebted as to induce the Court to believe that the intention of the settlement was to defraud his creditors, and some of those debts are still unpaid, the settlement may be set aside.

Quære, whether such a settlement can be treated as void at the suit of subsequent creditors.

A voluntary settlement, by which the settlor gives to the trustees of his property an absolute discretion to apply it in the maintenance and support of himself, his wife, and children, or any of them, in such manner as they should think fit, is not fraudulent against subsequent creditors. A fortiori, is such a settlement valid if for valuable consideration.

A., being entitled to a life interest in the dividends of 9000*l.* Consols, and being largely indebted: his brother agreed to pay all debts not charged on A.'s life interest, upon condition that such life interest should be settled so as to be applicable for the maintenance of A., his wife, and children, or any of them, at the absolute discretion of the trustees. This transaction having been carried into effect:—*Held*, that such settlement was valid against subsequent creditors, and also against a person who was a creditor of A. at the time of making the settlement, and whose debt was concealed by A. from his brother, and was the only one not paid by him.

During the negotiation which preceded this arrangement, the solicitor of A.'s brother wrote to A.—“The only object of your brother is to save your life interest, in case anything happens to you, and to effect this, he was willing to pay your debts.” And again he wrote

settlement, as being void against the Plaintiff under the 13 Eliz. c. 5.

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The Plaintiff had acted as solicitor for the settlor, and, on the 19th of March, 1853, he delivered to his client a signed bill of costs. On the 24th day of the same month, the settlement in question was made. On the 19th of May following, the Plaintiff brought an action for the amount of his bill; and upon the 6th of March, 1854, he entered up judgment in such action for 67*l.* damages and 74*l.* costs. He then took his client in execution, and, on the 23rd of August, 1854, the debtor being in prison, obtained a vesting order in insolvency; the Plaintiff opposed his discharge, and upon his opposition the debtor was remanded for five months from the 3rd of November, 1854. On the 14th of October, 1854, the Plaintiff was appointed assignee of his estate and effects.

In 1851, *C. J. Penney* had become entitled, under the trusts of an indenture of settlement, dated the 14th of January, 1849, to a life interest in the sum of 9000*l.* Consols, which was settled upon trust for him, for his life, with remainder, as to 100*l.* part of such dividends, to his wife *Elizabeth*, for her separate use, for life, and subject thereto upon certain trusts for the benefit of their issue. In 1852, *C. J. Penney* mortgaged his life interest in this fund for 450*l.*

to *A.*'s solicitor—"The income will of course be paid to *A.* as long as this can safely be done; but our conveyancer states, that it will be quite impossible to give *A.* any interest, however slight, without such interest passing to creditors in the case of bankruptcy or insolvency."—*Held*, that these letters did not amount to a secret trust for *A.*'s benefit; and that, therefore, they could not affect the validity of the settlement.

The discretion of the trustees being absolute,—*Held*, that the Court could not apportion the income between *A.*, his wife, and children, so as to make *A.*'s part of it available for his creditors.

The settlor having subsequently become insolvent:—*Held*, that his assignee in insolvency might institute a suit to impeach the deed.

A married woman being a party to a suit respecting her separate estate:—*Held*, that her husband must also be made a party, notwithstanding that he was insolvent, and his assignee was a party to the suit.

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The settlement sought to be impeached was dated the 24th of March, 1853, and made between the said *C. J. Penney*, of the first part; *Elizabeth* his wife, of the second part; *William Page Penney*, of the third part; and *William Page Penney, Augustus Bulls, and Thomas Taunton*, who were the trustees of the indenture of the 14th of January, 1840, of the fourth part; and, after reciting the interest of *C. J. Penney* in the said sum of Consols, and reciting, that the said *C. J. Penney* was then indebted to certain persons in divers small sums, not exceeding in the whole the sum of 208*l.*, but that no other debts or sums of money whatsoever were due and owing by him, except such sum of 208*l.*, and the said mortgage debt of 450*l.* and interest thereon; and reciting, that it was lately agreed between the said *C. J. Penney* and *W. P. Penney*, that, in consideration of the said *W. P. Penney* paying and discharging, out of his own moneys, the debts so due and owing by the said *C. J. Penney*, amounting to a sum not exceeding in the whole 208*l.* as aforesaid; and also in consideration of the said *Elizabeth Penney* covenanting not to alienate or anticipate the said annuity or sum of 100*l.* provided for her after the death of the said *C. J. Penney*, he the said *C. J. Penney* would settle and assure his life interest in the dividends of the said sum of 9000*l.* 3*l.* per cent. Consols, upon the trusts, and for the intents and purposes thereafter expressed concerning the same: and reciting, that it had also been agreed, that, in consideration of such settlement of the life interest of the said *C. J. Penney*, the said yearly sum of 100*l.*, to which the said *Elizabeth Penney* was entitled after the decease of the said *C. J. Penney*, under the said indenture of the 14th of July, 1849, should be rendered inalienable by her during her then present or any future coverture; and reciting, that, in pursuance of the said agreement on the part of the said *W. P. Penney*, he had paid and discharged, out of his own moneys, the debts so due and owing by the said *C. J. Penney*, amounting to a

sum not exceeding in the whole the sum of 208*l.* as aforesaid: It was thereby declared by the parties thereto, and particularly the said *C. J. Penney* did thereby direct and declare, that the trustees or trustee for the time being of the said indenture of the 14th of July, 1849, should stand and be possessed of the dividends or annual produce of the said sum of 9000*l.* Consols so limited in trust for the said *C. J. Penney*, during his life as aforesaid, subject, nevertheless, to the said mortgage debt and interest, upon trust thenceforth during the life of the said *C. J. Penney*, to pay, apply, lay out, and expend the dividends or annual produce of the said sum of 9000*l.* Consols in and towards the maintenance, clothing, lodging, and support of the said *C. J. Penney* and his present or any future wife, and his children, or any of them, or otherwise for their or any of their use and benefit, in such manner as the said trustees or trustee for the time being should, in their or his uncontrolled discretion, think proper. And it was further witnessed, that, in pursuance of the said agreement on the part of the said *Elizabeth Penney*, and in consideration of the premises, it was declared by the parties to the now stating indenture, and particularly the said *Elizabeth Penney* thereby directed and declared, that the said trustees or trustee for the time being should stand and be possessed of the yearly sum of 100*l.* limited in trust for the said *Elizabeth Penney*, for her sole and separate use, by the same indenture, upon trust, in case the said *Elizabeth Penney* should survive the said *C. J. Penney*, to pay such yearly sum of 100*l.* by equal half-yearly payments to her during her life, for her separate use, and so as that she should not have power to anticipate the same, as therein mentioned; and, after such voluntary or involuntary alienation by her as therein provided against, upon trust to pay and apply the same annual sum of 100*l.*, during the remainder of the life of the said *Elizabeth Penney*, either to her or any of her children or issue, or for her or their, or any of their, use or benefit, as the trustees or

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trustee for the time being of the said indenture of the 14th of July, 1849, should, in their absolute discretion, think proper.

The circumstances attending the preparation of this indenture were these: *W. P. Penney*, knowing that his brother had incurred debts, and had no property except his life interest in this sum of 9000*l.* Consols, was desirous of preserving it for the benefit of *C. J. Penney's* wife and children; and, accordingly, after advising with his solicitors on the best mode of doing this, determined to pay off all *C. J. Penney's* debts, on condition that he should execute the settlement above stated. The amount of *C. J. Penney's* debts turned out to be larger than he had at first confessed; but all that *W. P. Penney* could discover amounted to 208*l.*, and *C. J. Penney* solemnly declared that he owed no more. The Plaintiff's debt was not included in this sum, and *W. P. Penney* was ignorant of its existence at the time of making the settlement. He paid or satisfied all the debts making up the 208*l.*, which, as he believed, were all that *C. J. Penney* owed; and thereupon the settlement was executed.

Previously to its execution, and while the negotiation was going on, *W. P. Penney's* solicitors wrote to *C. J. Penney* or his solicitors, two letters relating to the matter, which were relied on by the Plaintiff, as proving that *C. J. Penney* in fact was beneficially interested under the settlement. These letters are stated in the judgment.

Argument.

Mr. Southgate, and *Mr. F. J. Wood*, for the Plaintiff.

Mr. James, Q. C., and *Mr. J. H. Taylor*, for the trustees, objected, that the wife *Elizabeth Penney* was a Defendant

but that her husband was not a party. This objection the trustees had taken by their answer.

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Mr. Southgate.—The wife has an interest to her separate use, and she is a feme sole as to that. The husband is insolvent, his assignee is a party; personally, the husband has no interest in the matter whatever. The only reason for making him a party would be, that he should admit or deny that he is insolvent, or, perhaps, to enable the Court to enforce its decree against the wife personally; but the only decree required in this case is against her separate property.

VICE-CHANCELLOR SIR W. PAGE WOOD.—I know of no authority for a suit against a wife in such a case in the absence of her husband; but I will hear the argument *de bene esse*, and give leave to add the husband as a party by amendment, if he will undertake to appear, and be bound by the decree.

Mr. Southgate, and *Mr. F. J. Wood*, for the Plaintiff:—

It is not enough, to support a deed against the effect of the 13 Eliz. c. 5, that some consideration was given for it. There should be a *bonâ fide* consideration: *Doe d. Parry v. James* (a), *Twyne's case* (b). Here, the consideration was grossly inadequate, and the object and effect of the deed was to "delay, hinder, or defraud" the Plaintiff.

The letters of the solicitor shew a clear intention to defeat all future creditors of *C. J. Penney*, and that alone would be enough; but the Plaintiff was a creditor at the time of the deed being executed, and is still unpaid; and Vice-Chancellor *Kindersley* has expressed an opinion, that, as subsequent creditors participate in the benefit when such a deed is set aside, even a subsequent creditor has an equity, whilst there

(a) 16 East, 212.

(b) 3 Rep. 81 b.

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are prior creditors unsatisfied, to file a bill to impeach the deed: *Jenkyn v. Vaughan* (a), *Stileman v. Ashdown* (b), *Richardson v. Smallwood* (c), *Goldsmith v. Russell* (d), *French v. French* (e).

If the settlement be valid, the Plaintiff, as assignee, is entitled to so much of the income of the settled fund as is not necessary for the maintenance of the wife and children: *Twopeny v. Peyton* (f), *Godden v. Crowhurst* (g), *Rippon v. Norton* (h), *Page v. Way* (i), *Lord v. Bunn* (k), *Young-husband v. Gisborne* (l), *Kearsley v. Woodcock* (m), *Wallace v. Anderson* (n).

Mr. Willcock, Q. C., and Mr. Bevir, for the wife and children of *C. J. Penney*:—

The settlement was made for valuable consideration. Everything that *W. P. Penney* could do to ascertain the amount of the debts, was done most carefully, that he might choose whether or not he would pay them; and all that were known he paid. The question, what is a valuable consideration? is the same under both statutes, 13 Eliz. c. 5, and 27 Eliz. c. 4; and, in *Roe v. Milton* (o), the concurrence of a third party was held to be of importance. So here, the covenant by the wife not to anticipate. [VICE-CHANCELLOR.—The smallest possible surrender of interest has been held enough to form a consideration to support a conveyance against the latter statute.] The adequacy of the consideration is not inquired into closely: *Lady Arundell v. Phipps* (p). The

(a) 25 L. J., Chanc., 338.

(b) 2 Atk. 481.

(c) Jac. 552.

(d) 5 De G., M'N. & G. 547.

(e) 6 Id. 95.

(f) 10 Sim. 487.

(g) Id. 642.

(h) 2 Beav. 63.

(i) 3 Id. 20.

(k) 2 Y. & C. C. C. 98.

(l) 1 Coll. 400.

(m) 3 Hare, 185.

(n) 16 Beav. 533.

(o) 2 Wils. 356.

(p) 10 Ves. 139.

mutual concurrence of husband and wife in levying a fine of lands, in which they were jointly interested, is sufficient: *Parker v. Carter* (a), *Ford v. Stuart* (b), *Scot v Bell* (c).

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—
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Such a suit is not properly instituted by the assignee of the settlor.

Mr. Southgate in reply.

VICE-CHANCELLOR SIR W. PAGE WOOD, (after shortly stating the facts, continued)—

Judgment.

It was admitted by the Plaintiff's counsel in opening the case, that they could not bring home to *W. P. Penney* knowledge of the Plaintiff's demand at the date of the settlement; but *C. J. Penney* was perfectly aware of it. As far as any negative can be proved, it is proved that it was not possible that *W. P. Penney* could have known of the Plaintiff's demand at the time this settlement was made. He saw that his brother was living in a manner which, considering his circumstances, was extravagant, and that he had borrowed 450*l.* upon security of this life interest, which was his only property; and *W. P. Penney* was minded to provide means for the support of the wife and family of his brother, and to arrest him in his course of extravagance. Accordingly, *W. P. Penney* held several communications with his brother, which commenced before the claim of the Plaintiff was made, and were of this nature: *W. P. Penney* being desirous to free his brother from all his existing debts, in order that some arrangement might be made for the future, by which his wife and children might be protected from the consequences of his improvidence, inquired into the amount of his debts. This was stated at first to be 160*l.*, then

(a) 4 Hare, 409.

(b) 15 Beav. 493.

(c) 2 Lev. 70.

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 ———
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170*l.*, then 180*l.*, and at last a bill was sent in for the schooling of the children, which raised the amount to 208*l.* At this *W. P. Penney* was dissatisfied, and seems to have doubted whether he should carry his proposal into effect. At last, however, he consented to do so, on condition that the whole amount of his brother's debts should be disclosed to him. Therefore, as far as *W. P. Penney* was concerned, I have no doubt that he was convinced that the effect of the transaction would be, that not a single creditor of his brother would be left unpaid. His object was to clear his brother of all his unsecured debts, and then to make a provision for his wife and family.

The indenture was drawn in a form which is not usual. I cannot find any instance in which the debtor himself, whose property is sought to be affected by a suit of this kind, has been capable of taking an interest in the manner provided by this deed. *C. J. Penney* does not take an actual interest under the deed. If he did, of course that might be attached by creditors; but there is an option given to the trustees to dispose of the property for the benefit of *C. J. Penney*, if they shall think fit. One of the trusts of the deed is, during the life of the said *C. J. Penney*, to pay, apply, lay out, and expend the dividends or annual produce of the fund in and towards the maintenance, clothing, lodging, and support of the said *C. J. Penney*, and his present or any future wife, and his children or any of them, or otherwise for their or any of their use and benefit, in such manner as the trustees or trustee for the time being should, in their or his uncontrolled discretion, think proper.

I will first consider the case independently of the letters which have been referred to. Assuming that the person who advanced the money, which was the consideration for this settlement, had no knowledge, at the time of the settlement

being made, that there were any unpaid debts of the settlor existing, and regarding this fact as an indication of the intention of the parties, although I am not aware of any case in which a deed of this kind has been supported, where it contained a power for the trustees to hand over part of the interest to the settlor; still, considering the question upon principle, in itself that circumstance would not be sufficient to make the deed fraudulent against subsequent creditors, whatever cause of suspicion it might occasion. In the case of *Harman v. Richards* (a), it was said by Lord Justice Turner, that, if a settlement be made for valuable consideration, then the only question for the creditors is, whether it was made *bonâ fide*; for a deed, though made for valuable consideration, may be affected by *mala fides*. The question is, was the object of the deed *bonâ fide*, or was there an intention to defraud creditors? With respect to voluntary settlements, the result of the authorities is, that the mere fact of a settlement being voluntary is not enough to render it void against creditors; but there must be unpaid debts, which were existing at the time of making the settlement, and the settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who, at the time of making the settlement, were creditors of the settlor. The mere fact of a man's making a voluntary settlement, and thereby parting with a large portion of his property, has never been held to make such a settlement fraudulent as against subsequent creditors. Sir Thomas Plumer, in *Richardson v. Smallwood* (b), said, that it had never been decided that a voluntary settlement was valid, where the settlor was largely indebted at the time, and subsequent creditors have applied for relief. That may remain yet to be determined. The illustration given by Sir Tho-

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(a) 10 Hare, 81.

(b) Jac. 552.

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mas Plumer of a settlement, which would probably be void against subsequent creditors, is, where, in order to evade the statute, a person, being considerably indebted, makes a voluntary settlement, which would be void if impeached by those who were then his creditors, and afterwards pays them off, and a new set of creditors stand in their places, who are left to do what they can. Such a settlement would be void against the subsequent creditors, because it would be a fraud upon the statute. The statute is for the protection of creditors, "or others," not creditors only; and, if such a case were presented to the Court, it would probably hold the whole proceeding to be a contrivance, and would consequently set aside the settlement.

I will in this case first consider whether a deed, merely voluntary, is fraudulent against subsequent creditors, from the fact that it contains a trust to apply the interest of the property in such manner as the trustees should think fit, towards the benefit of the settlor or his wife or children. In such a case, the instrument being merely voluntary, the intention may have been to take the property from the creditors, and it may be requisite to have the transaction fully investigated; but, supposing the settlor to have parted *bonâ fide*, by the deed, with all the control over his property, and to have vested it in the trustees, in order to give them the absolute power to deal with it as they please for the benefit of himself or his wife or children, that could not be held to be fraudulent against subsequent creditors of the settlor, any more than if it were a settlement simply for the benefit of the wife and children of the settlor. The distinction is too thin to authorise the Court to decide, that, because the settlor may possibly derive some benefit under it, the settlement must therefore be fraudulent. That I conceive would be the law if this settlement were voluntary. But as it is not voluntary, but for valuable consideration, and for the express purpose of protecting the wife and children of the settlor,

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and securing the property for their benefit, the circumstances of the case are strongly in favour of the validity of the deed. *W. P. Penney* would not have parted with his money to pay his brother's debts, unless this provision for his brother's wife and children had been made; and having parted with his money on the faith of this being done, he is entitled to say, that this benefit shall be secured, and that no creditor, prior or subsequent to the deed, shall be allowed to set it aside.

Then, the question which created the greatest doubt in my mind arises upon the letters. In one of these letters, the solicitors of *W. P. Penney* write to *C. J. Penney* on the 5th of February, 1853, as follows:—"The only object that your brother can have in view, is to save your life interest, in case anything happens to you; and to effect this object, he was understood, some days since, to be willing to pay your debts." "To save your life interest" may be read in two ways, either to save it for *C. J. Penney* himself, which the law would not allow to be done by any contrivance, to defeat his creditors—or to save it for his wife and children. The next letter was written on the 21st of March, 1853, by the same solicitors to the solicitor who acted in the matter for *C. J. Penney*. They write, "The income will of course be paid to Mr. *C. J. Penney* as long as this can safely be done; but, on referring to our conveyancer your letter of the 18th instant, wherein you state that you think it reasonable that Mr. *C. J. Penney* should have the control over a portion of the dividends, he states that it will be quite impossible to give Mr. *C. J. Penney* any interest, however slight, without such interest passing to creditors in the case of bankruptcy or insolvency." If there were any secret trust to pay him the dividends, and supposing that the course of proceeding mentioned in the letter, namely, paying the income to *C. J. Penney* as long as it could safely be done, meant, we will pay it him until an execution issues, I confess, I have

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no doubt in my own mind, that the deed would be fraudulent under the statute. The analogy to the cases of fraud upon the bankrupt laws would be very strong, where it has been settled, that a trader cannot, even for valuable consideration, settle his own property in such a manner as that he should take an interest in it until his bankruptcy, and, afterwards, it should be held in trust for his wife and children. In *Higinbotham v. Holme* (a), the doctrine was carried so far in the case of a man who was not a trader, that, where he had made a settlement previously to his marriage, to the use of himself for life, unless he should embark in trade, and in the lifetime of his wife become bankrupt, and on his death or bankruptcy to secure an annuity for his wife, Lord *Eldon* decided, that, upon the subsequent bankruptcy of the settlor, the settlement could not be upheld, but was void as a fraud upon the bankrupt laws. Looking at the terms of the statute, and the observations of Sir *T. Plumer*, I am of opinion, that, if the settlement in this case had been in that form, it would have been void against the Plaintiff.

But the purport of the letters I have mentioned is only this: "We are willing enough that Mr. *C. J. Penney* should have the benefit of this property, if it could be so arranged as that he could not dispose of it so as absolutely to take it away from his family; but if any interest were given to him by the settlement, his family would run the risk of losing it, and, therefore, such a settlement is rejected by his brother, and he stipulates that *C. J. Penney* shall part with the entire control." The words are, "The income will of course be paid to Mr. *C. J. Penney* as long as this can be safely done." To say that this amounts to a secret trust for Mr. *C. J. Penney*, until the property should be taken in execution by his creditors, would be too much;

(a) 19 Ves. 88.

but if not, it has no effect on the validity of the settlement. It appears to me plain, that *C. J. Penney* would find it impossible, from the terms of that letter, to fasten any trust upon this property for his benefit. If the trustees were to say, in the exercise of our discretion we shall henceforth pay the income to your wife and children, it would I think be impossible that *C. J. Penney* could rely upon this letter to prove that such a proceeding would be any fraud upon him, as having induced him to execute the deed in the belief that he was to be the real owner until his bankruptcy. However much doubt it raised in my mind, I still think that *W. P. Penney*, having consented to pay the debts upon condition that the property should be settled, so that the trustees should have that uncontrolled discretion, there is nothing in these letters which would tend to fix a trust upon the property in favour of *C. J. Penney*, to bring the settlement within the doctrine of *Twynes' case* (a), or to make it fraudulent against subsequent creditors.

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The case supposed by Sir *T. Plumer*, and to which I have referred, is very different. That was a scheme to raise money to discharge debts, and to defraud future creditors. Nothing of that kind was contemplated here. With regard to the existing creditors, there was the utmost bona fides on the part of *W. P. Penney*. He thought that he had paid off all the existing creditors, so as to leave the fund entirely free, to be settled for the benefit of the wife and children, whom he intended throughout to benefit, as his paramount object, though, no doubt, he was also desirous, as far as he consistently could, to benefit *C. J. Penney*.

It was argued, that, if I came to a conclusion in favour of the settlement, I must decide how much should be allowed to the wife and children, so as to leave the rest of the in-

(a) 3 Co. 81 b.

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—
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come for the creditors of *C. J. Penney*. I think, however, that it is not possible for me to do that, where an absolute discretion of applying all or any part of the income for their benefit is given to the trustees. Here, there is such an absolute discretion, and I cannot interfere with it, and cannot decide what proportion the wife and children are to take.

I have no doubt of the right of the assignee in insolvency to sue in this case. In *Doe v. Ball* (a), Baron *Parke* and the present Lord Chancellor decided, that an assignee in insolvency might properly represent all the creditors in proceedings to set aside an instrument, which any of the creditors might have instituted.

The only remaining point is as to the costs. I cannot give costs to *Mrs. Penney*. Her husband was aware of his debt to the Plaintiff, and my observations as to the bona fides of the transaction have no application to him. I dismiss the bill without costs.

(a) 11 M. & W. 531.

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SMITH v. LAY.

Dec. 19th,
20th, & 22nd.

THE Plaintiff's late firm, now represented by the Plaintiff, were shipbuilders, and shipowners and brokers, at *Newcastle*, and, in 1853, were part-owners with the Defendants of a vessel named the *Tudor*, the Plaintiff's firm being owners of 38-64ths, the Defendant *Lay* of 20-64ths, and the Defendant *Roberts* of the remaining 6-64ths.

*Shipping—
Managing
Owner—Ship
Broker—Trust
and Trustee.*

The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services (as, *semble*, there would be between the services of ship's chandler or ship's carpenter) and his fiduciary character as managing owner.

But, before allowing him a commission in respect of the services in question, the Court directed an inquiry, whether, according to the custom of ship-owners or otherwise, he, being managing owner, was entitled to any and what commission in respect of duties performed by him, and

The Plaintiff's firm acted as managing owners of the vessel, and also as shipbrokers, and, in their accounts rendered to the Defendants, they charged commission as managing owners, and also made certain charges in respect of services rendered by them as brokers to the ship.

The Defendant disputed their right to make these charges, and eventually put a stop upon his portion of the freight, under the Warehousing Act, 8 & 9 Vict. c. 91, s. 51, giving notice to the persons liable to pay the freight then due, not to pay his proportion to the Plaintiff's firm.

The Plaintiff then filed his bill, insisting on his right to make the charges in dispute, and praying for an account of all the dealings and transactions between the Plaintiff and his late firm and the Defendants respecting the vessel, and to have the notice withdrawn.

Mr. *Rolt*, Q. C., Mr. *Cairns*, Q. C., and Mr. *Dickinson* for the Plaintiff.

Mr. *Daniel*, Q. C., and Mr. *Humphry*, for the Defendant

which duties are ordinarily performed by shipbrokers.

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Argument.

Lay, disputed the Plaintiff's right to make any charges in respect of services rendered by the firm while managing owners, and ordinarily performed by a shipbroker.

First, the services in question were incompatible with the duties of the Plaintiff's firm as managing owners of the ship. By assuming those duties, the firm had placed themselves, in relation to the Defendants, in a fiduciary position, as was clear from Lord *Tenterden's* statement of the duties of managing owners (a); and, occupying a fiduciary position, they were precluded from appointing themselves to act in any way as brokers of the ship. The ship's broker was a tradesman; and, according to the Plaintiff's contention, there would be nothing inconsistent in managing owners appointing themselves the universal tradesmen of the ship. In principle, there could be no distinction between the position of a managing owner of a ship, and that of a managing director of a ship's company, which had been held by Lord Justice *Knight Bruce*, when Vice-Chancellor, to preclude a director from undertaking the office of ship's husband, though with the consent of his co-directors, upon the ground that he was a trustee for the other shareholders, and tacitly under an engagement not to make a profit of his duty: Here, as there, without any special provision for the purpose, it was by law an implied and inherent condition of the relation subsisting between the parties, that the party occupying a fiduciary position should not make any profit to himself of his trust, and should not acquire to himself, while he remained in that position, an interest adverse to his duty: *Benson v. Heathorn* (b). But,

Secondly, if not precluded from appointing themselves to act as brokers to the ship, the Plaintiff's firm were at least precluded from charging any commission for services rendered by them in that capacity.

(a) Abbott on Shipping, 8th edit., p. 105. (b) 1 Y. C. C. C. 326, 341.

[The VICE-CHANCELLOR inquired what specific charges were objected to by the Defendant.]

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—
Argument.

Mr. Humphry.—The Plaintiff has made one charge for collecting freight in his capacity of managing owner, another for disbursing it in his assumed capacity of ship's broker; and admitting that he was not precluded from assuming the latter capacity, which we deny, at any rate he is not entitled to receive anything, whether by way of commission or otherwise, for services rendered by him in that character. He might have employed a broker to discharge these services, and he would have been allowed any commission paid to such broker; but, having thought fit to discharge them himself, he is precluded from making any profit by so doing.

The VICE-CHANCELLOR (to *Mr. Rolt*).—It does not appear to me that the services in question are incompatible with the Plaintiff's character as managing owner. The question is, whether he is entitled to any commission for discharging them.

Mr. Rolt, Q. C., in reply:—

If the Court consider that there is no incompatibility in the duties, the onus does not lie with the Plaintiff to shew a contract that he was to be paid for them. Having thought fit to discharge both duties, he is entitled to be paid for both, and the Court will direct an inquiry as to the amount.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In reference to the first question raised for the Defendant, viz whether the services in question were not incompatible with those which devolved on the Plaintiff's firm as

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managing owners of the ship, I was anxious to see the particular items in dispute, so as to ascertain the precise nature of the services which, according to the Defendant's contention, were incompatible with the duties of managing owner.

Having now seen the accounts, and examined the items in question, I am satisfied that no one of the services to which those items refer, is incompatible with the duties which devolved on the Plaintiff as managing owner.

The case of *Benson v. Heathorn*, cited by Mr. *Daniel* in support of a contrary proposition, was very different. There, one of the directors of a shipping company undertook, without the consent of the body of the shareholders—in the absence of any agreement with them, and, as it were, behind their backs—to constitute himself ship's husband, and in that character received commission and brokerage out of the company's funds. And the decision in that case was, that no director had a right, even with the consent of the board of directors, to take that course: to do so was clearly to assume two incompatible characters, in one of which it was his duty to watch, while in the other he himself was the party to be watched. As a director, it was his duty to exercise over every one of the company's servants constant and vigilant superintendence and control. By assuming to himself the office of ship's husband, he became himself the person whose conduct and accounts it was his duty to superintend and to check (a). To assume that office, a director of such a company had no right. But here, *ex concessis*, the Plaintiff, as owner of the majority of shares in the ship, had a right to constitute himself managing owner.

Then, having a right to constitute himself managing owner, and having exercised that right, he performs ser-

(a) 1 Y. & C. C. C. 340, 342.

vices, some of which, as the Defendant contends, are ordinarily performed by shipbrokers. I can understand an objection being raised, if the Plaintiff, being managing owner, had constituted himself ship's chandler or ship's carpenter; but here, all that is objected to is, that he has collected and distributed the freight. It appears to me, that, in employing himself to do this, there is nothing incompatible with his duty as managing owner.

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Judgment.

In reference to the second question, viz. Whether he is entitled to charge a commission or brokerage for the services in question, it was admitted that he might have employed a broker, and would have been allowed any money he might have paid to a broker for the discharge of those services; but, having thought fit to dispense with that intermediate step, and to discharge those services himself, it was argued that he was not entitled to make any charge in respect of such services. In reference to this part of the Defendant's contention, it has struck me that the case may bear some analogy to the case of a mortgagee acting as receiver, as to which the law is now settled, after some difference of opinion upon the subject, that, although a mortgagee, employing a receiver to collect the rents, for instance, of several small holdings, would be entitled to credit himself in the accounts with poundage paid to such receiver; still, if he thinks fit to dispense with the receiver's services, and to collect the rents himself, poundage would not be allowed him.

Therefore, what seems to me to be proper on this branch of the case is, to direct an inquiry whether, according to the custom of ship-owners, or otherwise, the Plaintiff and his late partner, being managing owners of this ship, are entitled to be paid any and what commission in respect of duties performed by them, and which duties are ordinarily performed by shipbrokers.

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There must be a common account of all dealings and transactions from the commencement of the partnership, but not disturbing any settled account; and the Defendant must forthwith withdraw the notice to stop the freight.

Decree accordingly, reserving further consideration and costs.

Nov. 12th,
14th, 17th, &
20th.

Creditors—
13 Eliz. c. 5—
Voluntary
Purchase of
Stock—Trust
for Children—
1 & 2 Vict. c.
110—Married
Woman—Sav-
ings—Separate
Property—
Onus of Proof
—Making An-
swer an Affida-
vit.

BARRACK v. M'CULLOCH.

THIS was a creditors' suit against the widow and executrix of *William Mariner*, deceased, and against certain persons in whose names *W. Mariner* had in his lifetime invested 900*l.* in the purchase of stock, upon trust for his daughters. The bill sought to have such trust declared void under the stat. 13 Eliz. c. 5, as against the creditors of *Mariner*.

The Plaintiff's claim arose in this way: *Mariner* in his

Since the passing of the 1 & 2 Vict. c. 110, an investment of money in the purchase of stock in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property besides the money so invested to pay the debts he then owed, is void under 13 Eliz. c. 5; because, by the 1 & 2 Vict. c. 110, money or stock may be taken in execution, and therefore the effect of such a settlement would now be to delay, hinder, or defraud the creditors of the settlor.

For the same reason, any purchase of property by a settlor so indebted, in the name of a child or other person, would now be void under the statute of Elizabeth.

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name, belongs to her husband.

Secus as to moneys saved by her out of the income of her separate estate, and so invested.

Where such investment had been made by her husband for her, upon its being impeached by his creditors after his death,—*held*, that the onus was upon her to prove that the moneys were the savings of her separate estate.

She proved that they were saved out of rents of furnished houses, which were settled to her separate use:—*Held*, that threw back upon the creditors the onus of proving that the furniture belonged to the husband, and, also, what part of the rents were to be attributed to the furniture.

Except on a motion for decree, answers of Defendants cannot be read as affidavits, upon notice that they will so be used at the hearing; but to make them affidavits, the respective Defendants must confirm their answers by short affidavits referring to them as exhibits.

Heale v. Bar. 7. W. R. 45.

lifetime was clerk to Mr. *Heseltine*, a stockbroker, and being a friend of the Plaintiff, *James Barrack*, and his wife, Mrs. *Barrack* from time to time, in the years 1852 and 1853, gave to *Mariner* money to invest. This money she took partly out of the profits of her husband's business, and partly, during a time when the business was being carried on by trustees for the benefit of her husband's creditors, out of moneys allowed to her from time to time by such trustees, and she gave it to *Mariner* to invest without her husband's knowledge. *Mariner* furnished an account of investments, which he represented that he had made with the moneys so given to him. He died in October, 1853; and upon his death it appeared that the investments which he represented that he had made were not in existence, if they had ever been made; and the Plaintiff now claimed against *Mariner's* estate the moneys given to him for investment, with interest, amounting altogether to more than 1000*l*.

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M'CULLOCH.
Statement.

The transaction sought to be impeached by the Plaintiff was an investment by *Mariner*, in July, 1852, of three sums of 300*l*. in the names of two trustees and one of his three daughters; each sum being invested in the name of a different daughter and the two trustees: and the brokers' bought notes expressed that the investments were made by *Mariner's* direction. The case made in defence was, that these sums of 300*l*. each were moneys belonging to Mrs. *Mariner*, and saved by her out of the income of her separate estate, which she had kept for some time sewn up in her stays; and that, in July, 1852, she had given them to her husband to invest for her daughters in this manner. Her separate property, from the income of which she represented that she had accumulated this fund, consisted of some land on which were two houses. There was some evidence that one of the houses had been built partly with the husband's

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Statement.

money, and they were certainly furnished by him. These houses were let furnished, and Mrs. *Mariner* received the rents, and from them she stated the 900*l.* had been accumulated by her. At the time of making the investment, *Mariner* was in embarrassed circumstances, and at his death he was largely indebted to other persons beside the Plaintiff, and left property to the value of not more than 300*l.*

It was admitted that *Mariner's* estate was insufficient to pay the Plaintiff's debt, unless the stock could be made liable to the claim.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the Plaintiff:—

If the Plaintiff proves, that, at the time of the voluntary appropriation of this money, there existed debts of the husband which are still unpaid, that is sufficient ground to induce the Court to direct an inquiry as to his circumstances at the time, if not to conclude that the appropriation was fraudulent against his creditors: *Skarf v. Soulby* (a).

[VICE-CHANCELLOR.—In *French v. French* (b), the Lord Chancellor says, that “The statute of Elizabeth applies to all transactions of which the effect is to withdraw any portion of the property, so that there does not remain sufficient to enable creditors to pay themselves.” It is not enough to prove merely that the donor was indebted at the time.]

Mr. *James*, Q. C., and Mr. *Fooks*, for the Defendants, proposed to read the answers as affidavits.

Mr. *Rolt*, Q. C.—I object to having the answers read as

(a) 1 Mac. & G. 364.

(b) 6 De G., Mac. & G. 95.

evidence against the Plaintiff. This is not a motion for decree, but replication has been filed. The Defendants have given notice that they will read their answers, but that is not the practice. They should have verified them by affidavits referring to them as exhibits, and confirming them. Otherwise the answers cannot be made affidavits, except on a motion for decree.

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—
Argument.

The VICE-CHANCELLOR decided that the answers could not be used as affidavits; but it was arranged that they should be so used, upon condition that Mrs. *Mariner* and *M'Culloch*, one of the trustees, should be cross-examined in Court, and that the argument should proceed upon the question of law, whether a gift of money or stock came within the provisions of the stat. 13 Eliz. c. 5.

Mr. *W. M. James*, Q. C., and Mr. *Fooks*, for the Defendants:—

A gift of money is not within the statute: *Duffin v. Furness*(a). Neither is a settlement of a policy of insurance: *Grogan v. Cooke* (b); because, when this Act was passed, creditors could not attach property of that nature; and therefore a settlement of such property could not delay, hinder, or defraud them. If such property can now be taken in execution, the statute of Elizabeth cannot, therefore, be extended to include it. [Mr. *Rolt*, Q. C., referred to *Sims v. Thomas*(c), in which it was held that the assignment of a bond, before the passing of 1 & 2 Vict. c. 110, did not come within the 13 Eliz. c. 5; but it may be inferred from the judgment, that the decision would have been different if the bond had been assigned since 1 & 2 Vict. c. 110. The VICE-CHANCELLOR referred to *Watts v. Jefferyes* (d), in which Lord *Truro* held, that a creditor

(a) Ca. t. King, 77.

(c) 12 Ad. & E. 536.

(b) 2 B. & B. 230.

(d) 3 Mac. & G. 422.

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might attach a cheque of the Accountant-General in favour of the debtor.] Stock was not within the statute, and is not now, because it can only now be reached by a creditor by means of a charging order: *Horn v. Horn*(a); *Cochrane v. Chambers*(b); *Dundas v. Dutens*(c); *Rider v. Kidder*(d). Then it must be proved that the settlor was insolvent, or nearly so, at the time of making the settlement, or it must be shewn in some other way that the intent of the settlement was to defraud creditors: *Townshend v. Westacott*(e).

On principle money cannot be within the statute; for *Mariner* might have squandered it, and it could not be followed by his creditors.

The VICE-CHANCELLOR.—Upon the first point, I have no doubt that the money given by *Mrs. Barrack* to *Mariner* was her husband's money. It appears that she took it out of his business, and received it partly from the trustees, who were appointed for the benefit of her husband's creditors. There is no evidence that the husband ever concurred in any act by which his wife acquired property for her separate use. I must, therefore, assume that the money which she gave to *Mariner* to be invested, without the privity of her husband, was money which belonged to him. It is not like the savings of a married woman out of her separate estate. Any money given to her by her husband for household purposes, or for dress, or the like, and applied by her in making investments in her own name, would belong to her husband.

There can be little question as to the debt. This lady

(a) Amb. 79.

(b) Ib.

(c) 2 Cox, 235; 1 Ves. jun. 196.

(d) 10 Ves. 360.

(e) 2 Beav. 340.

was advancing money to *Mariner*, and it is clear that the money was embezzled, or that the stock purchased with it was embezzled, for none was forthcoming at *Mariner's* death.

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Mr. Rolt, Q. C., in reply.—A gift of money or stock must now be within 13 Eliz. c. 5, because 1 & 2 Vict. c. 110, enables creditors to attach such property, and therefore they may be defeated by its being given away. If he had squandered it, he would have got some value for it.

VICE-CHANCELLOR SIR W: PAGE WOOD:—

The points of law which arise in this case are, first, Whether, assuming that the Plaintiff was a creditor of *Mariner*, and that the money in question was the Plaintiff's money, *Mariner* was in debt to such a degree as would render a settlement made by him for the benefit of his children, or others, void; and secondly, Whether or not the particular settlement in this case, being of a sum of stock purchased with the moneys which, for the purpose of this question, I will assume to have belonged to *Mariner*, would be void as against his creditors, under the stat. 13 Eliz. c. 5.

Judgment.

I have already held and given my reasons for holding the Plaintiff to be a creditor, notwithstanding some peculiarity in the circumstances of the case.

I think also that the state of indebtedness of *Mariner* is quite sufficiently proved; and it is impossible for me to hold, if the money was his, that he was not indebted to such a degree as would render any attempt by him to make a voluntary settlement of this property void under the statute. The legal question upon the settlement is this: It is proved that bank notes to the amount of 900*l.* were handed over to a stockbroker, in order to purchase stock in the

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names of two trustees and the children; in each case there were two trustees and one of the children of *Mariner*. It was argued, that, inasmuch as the settlement was not of the property of *Mariner* himself, but only of property purchased by him, it could not have been taken in execution; and that therefore, on the authority of *Rider v. Kidder* (a) and that class of cases, in which it has been held, that, where property which could not be taken in execution is the subject of a settlement, such settlement does not come within the provisions of the stat. 13 Eliz. c. 5, I ought not to hold this case to be within the statute. Those decisions with regard to stock, copyhold property, and the like, are founded upon the terms of the preamble of the statute, which declares it to be "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man." Now, it has been held repeatedly, that an assignment of property which could not be taken in execution is not, within the words of the statute, an assignment of property with the intent to delay creditors, inasmuch as creditors never could have had execution or satisfaction out of such property; and further, in *Fletcher*

(a) 10 Ves. 360.

v. Sedley (a), referred to by Sir William Grant in *Glaister v. Hewer* (b), the Court, without expressing any opinion on the statute, held, that a purchase was not within the statute, inasmuch as it was said, that the party, whose property was sought to be affected, might have given the money to a child, and the child might have made the purchase; and that, unless the purchase itself was substantially affected with fraud, as Lord St. Leonards expresses it in his treatise on Vendors and Purchasers, p. 917, 11th edit, the mere fact that the money of the debtor is laid out in the purchase of land for the benefit of a child, would not be a reason for bringing such purchase within the statute. I think that this rule was founded again upon the same doctrine. It was true, at that time, that money might be given to a child; but it is not true, now, that either cash or notes could be given to a child by a person heavily indebted, without falling within the provisions of the statute. Adopting the decision of *Rider v. Kidder* (c), the Court of Queen's Bench seem to have thought, that, in the case of bonds or the like, which formerly could not have been taken in execution, but are now being capable of being taken in execution, they would be within the statute: *Sims v. Thomas* (d). The 1 & 2 Vict. c. 110, expressly enacts, that money and bank notes shall be capable of being taken in execution, and therefore I apprehend that a person largely indebted could not pass over to a child either money or bank notes for the purpose of making a purchase, or, if he did, that his creditors might follow the money, which he had so handed over covertly as against them, into the land or stock, or whatever else had been purchased therewith, and any voluntary gift of it would be void against them. The late case of *French v. French* (e) shews that

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(a) 2 Vern. 490.

(b) 8 Ves. 199.

(c) 10 Ves. 360.

(d) 12 Ad. & E. 536.

(e) 6 De G., Mac. & G. 95.

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property, purchased as it was in that case with the goods of the debtor, is within the statute. The debtor in that case sold his business and stock in trade, in consideration of a money payment, and also an annuity to himself, and a contingent annuity to his wife if she survived him; and it was held that the annuity so purchased for his wife was a gift to her by her husband, which was void under the statute as against his creditors.

I am therefore of opinion, that, assuming the money in this case to have been the money of *Mariner*, the settlement is void under the statute. The question, however, remains, whether or not this was his money; and that question must be determined by the examination of *Mrs. Mariner* and *M'Culloch*.

Nov. 20th.
Statement.

The case stood over to this day, when *Mrs. Mariner* and *Mr. M'Culloch* were examined in Court, as to whether the money invested by *Mariner* was his wife's money or his own.

The result of that examination is stated in the following judgment:—

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Several objections have been urged, in point of law, against the attempt made by the Plaintiff to set aside these settlements. At first, it was contended, that the statute had not any application to cases of this description. Those arguments, however, I did not accede to; and the question is now reduced simply to this, whether the moneys invested were the moneys of the husband or of the wife.

In the first instance, there appeared to be *prima facie*

evidence, that the moneys were the moneys of the husband; because, from the entry of the broker, who is now dead, it appeared that he received them from the husband. It seemed to me, therefore, that the onus was thrown upon those who claim under the settlements, of proving that the moneys invested were not the moneys of the husband, but belonged to *Mrs. Mariner*.

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Judgment.

The first part of the story set up by *Mrs. Mariner* was one, unquestionably, which required great sifting; and I should be extremely reluctant to accept it upon the evidence of the party herself, unless it was very materially corroborated by circumstances; for, although not an impossible event, yet that, which was alleged to have occurred, was, to say the least of it, invested with a considerable amount of improbability. The statement was, that she had preserved this sum of 900*l.*, inclosed in her stays, and having it in this manner in her possession as her own separate property, saved out of property settled to her separate use, she had given it to her husband for the purpose of making those investments. The case therefore required to be sifted to the utmost, and, accordingly, the lady and one of the trustees have been cross-examined; and I have now their evidence upon the subject, and also such inferences as may be drawn from the circumstances of the case. A considerable step was made in her favour, when it was proved that there was property settled to her separate use, from which this accumulation might have been made. It appears, that there was a settlement made of some land to her separate use in 1841, long anterior to the transaction in question; and upon the property so settled two houses had been built. There is some discrepancy in the evidence as to what was the exact amount of her money, and the exact amount of her husband's money, applied in the building of the second house; but the matter occurred too long ago for any attempt

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—
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now to be made to open that transaction, and counsel, very properly, did not seek to do so. As far as the original transaction is concerned, that property became hers; and whether the second house was mainly built with the husband's money or her own money is not material, the property, unquestionably, when the houses were so built, became hers, and her interest in it was for her separate use.

These houses, however, were let furnished, and the furniture appears to have belonged to the husband. It was urged on that part of the case, that it would be for her to shew how much of the accumulation was the produce of that which belonged to her husband, and how much was the fruit of that which belonged to herself. I do not think that the case can be so put, because it appears to me, assuming the statement to be true, (and upon that I shall have more to say presently), that this money was so kept by her in her stays and that she was allowed to accumulate it,—if her husband permitted her from time to time to receive these rents, part of which was the fruit, in some respect, of the furniture which he had put into the houses, which she had to her separate use,—then it would be incumbent on those who contend that this lady cannot now insist on having those savings as her own, as being the savings of property settled to her separate use, to shew me that these receipts were permitted to be made in respect of the double property so situated, at a time when the husband was insolvent, otherwise, I could not enter into any such minute question as that which has been suggested. I think that the onus of proof would be thrown on those who impeach the transaction, to shew that the case is one falling within the statute of Elizabeth. If her story be true, she was allowed by her husband to receive and accumulate all those rents, and, unquestionably she was allowed by him to receive them as her separate

property, for the houses were hers for her separate use, and if he chose to put in the furniture, and to permit her to receive the rent of the houses so furnished, I apprehend it was an appropriation of the rent of the furniture also to her separate use; and there is nothing in the present state of the evidence, to shew me that that appropriation was such an appropriation of any portion of his property, that I can follow it, or set aside the transaction under the provisions of the statute of Elizabeth.

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Judgment.

Then, the real question is, how far am I to give credit to all this strange story? One great difficulty was got over when I found that there was income of separate property, which she could have received and accumulated.

[The VICE-CHANCELLOR examined the evidence, and continued:—]

I find that there were houses settled to her separate use, the rent of which was amply sufficient to enable her to accumulate the amount of 900*l*. I find that one of her sons-in-law was in the habit of borrowing of her considerable sums. I find, that, at the time this transaction took place, liable as it is to some slight degree of suspicion from the fact that Mr. *Mariner* himself was embarrassed at the time the purchase was made, the matter did originate distinctly with Mrs. *Mariner* and not with him; and that she spoke to both the trustees in order to have the purchase of stock made in their names; and that the husband, when he applied to the trustees, represented himself as acting on behalf of his wife; and although, of course, his being embarrassed gives occasion to some observation, I cannot consider it as in any way proved, that, in making that statement, he did it with the long-sighted view of abstracting property from his own creditors. I think, therefore, on the whole of the case, that,

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—
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having had such testimony to corroborate the history which she has given of the transaction, I am bound to treat the money invested, as her money and not his. The consequence is, that I shall dismiss the bill as against these parties, with costs; but if the estate be insolvent, as I think it is a very proper case on behalf of creditors to be sifted, although I cannot throw that expense on the parties who have explained it, the Plaintiff should have his costs, if ultimately the estate is not sufficient to pay creditors; because I look upon it as a suit by him on behalf of himself and all other creditors, in which he and all the others would share in the benefit, if any had been derived. What, therefore, I propose to do now is, to dismiss the bill, with costs, against the trustees and the daughters of *Mariner*, and to make the common administration decree, reserving the question, whether those costs should not ultimately be paid out of the estate, as I am of opinion they should, if the estate prove to be insolvent.

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THE LONDON AND BLACKWALL RAILWAY
COMPANY v. THE BOARD OF WORKS FOR
THE LIMEHOUSE DISTRICT.

THE Plaintiffs, being an incorporated railway company, and subject to the provisions of the Companies, Lands, and Railways Clauses Consolidation Acts, 1845, were possessed of a railway, which was carried across the *Commercial-road*, near *Stepney*, by means of a bridge, duly constructed under the powers of their special Act to the satisfaction of the engineer or surveyor to the trustees of the said road.

*Construction—
Special Sta-
tutes—Incon-
sistency—
Amendment—
Costs.*

Whenever the Legislature has, by a special Act, conferred powers upon a corporation or body of commissioners, for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule the powers given by the former Act.

The *London and Blackwall Railway Act*, 1855, after noticing the former Acts of the company, recited as follows in the preamble: "And whereas, since the passing of such Acts, various lines of railway have been brought into connection with the *London and Blackwall* railways, and numerous additional trains pass over such railways; and whereas it is expedient that the company should be enabled further to widen their railways, and to take additional lands, and to complete the enlargement of their works . . . And whereas it is expedient that some of the powers and provi-

A railway company were empowered by their special Act to widen a branch of their railway passing through *London*, and to build additional stations. In conformity with the powers so given, they proceeded to erect a station on their land by the side of a highway, within the distance required to be left between buildings and highways in *London*, by the *Metropolis Local Management Act*, which had passed shortly after the special Act of the company:—*Held*, that the powers conferred on the company by their special Act were not controlled by the later statute, and that the company were authorised so to build their station.

By a statute passed prior to the *Railway Act*, the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. The *Metropolis Local Management Act* repealed this statute, and vested this authority in the managing body thereby constituted:—*Held*, that the trustees of the road must be taken to have been present at the passing of the *Railway Act*, as well as of the *Metropolis Act*, and, therefore, the powers given by the *Railway Act* must prevail.

Costs occasioned by a notice of motion, which was rendered ineffective by a subsequent amendment of the bill, must be paid by the Plaintiff.

new Act, the Plaintiffs were proceeding to widen the bridge across this road, and to build a new station on the said piece of land, adjoining to the piers of the bridge, and in a line with them. To this the Board of Works for the *Limehouse* district objected, because, they said, the station would project further forward than the line of buildings in the *Commercial-road*, and they gave the Plaintiffs notice, that, if the building proceeded, they should demolish it, and recover the expenses from the Plaintiffs under the provisions of the 18 & 19 Vict. c. 120, s. 143. Thereupon the Plaintiffs filed this bill for an injunction to restrain the Defendants from executing their threat, or from in anywise obstructing the Plaintiffs' new works. The question of legal and public interest which arose in the suit, was, whether the additional powers conferred upon the Plaintiffs by the *London and Blackwall Railway Act, 1855*, were in any degree interfered with by the subsequent Act, 18 & 19 Vict. c. 120, for the better local management of the Metropolis.

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 v.
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 Statement.

The following are the most material sections of this statute:—

143. "No building shall, without the consent in writing of the *Metropolitan Board of Works*, be erected beyond the regular line of buildings in the street in which the same is situate in case the distance of such line of buildings from the highway do not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; and in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate, to cause the same to be demolished or set back (as the case may require), and to recover the expenses incurred by them from the owner of the premises, in manner provided by this Act."

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 ———
Statement.

247. "All Acts of Parliament in force in any parish or place to which this Act extends, or in any part of such parish or place, shall, so far as the same are inconsistent with the provisions of this Act, be repealed as regards such parish or place, or such part thereof, notwithstanding any provisions of this Act continuing and transferring respectively to vestries of parishes and transferring to district boards any duties, powers, or authorities now vested in vestries, commissioners, or other bodies."

Sect. 244 vested in the district board "all powers and property vested in the trustees of the *Commercial-road* . . . so far as regarded the footpaths of such road."

This was a motion for an injunction. The Plaintiffs had previously given a similar notice of motion, and had afterwards amended their bill, and then given this notice.

Argument.
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Mr. *Rolt*, Q. C., and Mr. *Greene*, for the Plaintiffs.

Mr. *Cairns*, Q. C., and Mr. *Hetherington*, for the Defendants.

Gregory's case (a), *Williams v. Pritchard* (b), *Eddington v. Borman* (c), *Richards v. Easto* (d), *The Trustees of the Birkenhead Docks v. Laird* (e), *Cother v. The Midland Railway Company* (f), and *Dwarris on Statutes*, p. 514, were referred to.

Judgment.
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VICE-CHANCELLOR SIR W. PAGE WOOD:—

I confess that I entertain a strong opinion on the law

(a) 6 Rep. 19.

(b) 4 T. R. 2.

(c) Id. 4.

(d) 15 M. & W. 244.

(e) 4 De G., Mac. & G. 732.

(f) 2 Ph. 469.

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 Judgment.

tioned in some of the other cases, about two statutes of an affirmative character. The first instance which is given in *Sir Foulke Grevil's case*, is one in which the second Act was of a negative character, negating the payment of any new duties, the first Act being special with regard to a particular class of his Majesty's subjects, merchants, who were carrying goods abroad, and who were thereby required, according to the then existing notion of the propriety of interference in trade, to bring back a certain quantity of bullion. The reason of the rule is manifest. The Legislature, in passing a special Act, has entirely in its consideration some special power which is to be delegated to the body applying for the Act on public grounds; and the preamble of every statute of this kind contains a recital of its being for the public convenience that the particular powers should be granted. When a general Act is subsequently passed, it seems to be a necessary inference that the Legislature does not intend thereby to regulate all cases not specially brought before it; but, looking to the general advantage of the community, without reference to particular cases, it gives large and general powers, which in their generality might, except for this very wholesome rule of interpreting statutes, override the powers which, upon consideration of the particular case, the Legislature had before conferred by the special Act for the benefit of the public. The result of a contrary rule of construction in this particular case would be, that the Legislature, having authorised the construction of the railway, so as to confer a public benefit upon a particular district through which it was to pass, would be supposed afterwards, by the general statute, to throw it into the power of a few trustees to say whether the railway should be made or not. The right which is now insisted upon by the trustees must go that length. The argument on this part of the case was no less than this, that, if the railway company wished to do what the Legislature has stated to be a great public benefit, namely, to widen the railway, and for that

purpose to have another pier planted by the side of the present pier, and in the same line with it, this could not be done without the consent of the board of works for the *Limehouse* district.

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—
Judgment.

Lord *Cottenham* seems to have proceeded upon this principle of construction in *The Attorney-General v. The Eastern Counties Railway Company* (a), which was a case very analogous to the present, because there the parties were nearly in the same position as the parties here. There, it is true, the general Act of Parliament vested in certain parishes particular rights, by which light and air were to be secured to them, through the instrumentality of commissioners appointed by an Act of the 57 Geo. 3 in those parishes. A railway Act was afterwards passed, directing the railway to be made in a certain manner, which might affect the light and air in some parts of the parishes, but expressly reserving all the benefits and privileges which had been conferred by the 57 Geo. 3, as if the later statute had not been passed. Therefore the Legislature had both Acts within its purview. It was just as if the Act of the 57 Geo. 3 had been re-enacted, so as to override the special powers of the railway company. Lord *Cottenham* had no doubt as to the right of the company to make the specific works directed to be made; but he doubted, and in that respect the case is important as an authority in this case, whether, under their general power to make stations, which were not specifically designated by the railway Act, the company had power to build them in such a manner as to interfere with the light and air. Possibly, there might have been modes of making the stations which would not interfere with the light and air. Lord *Cottenham* granted the injunction as to the stations, but he sent a case for the opinion of a Court of law upon the question

(a) 2 Railw. Cas. 823.

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whether or not the company were authorised to make the stations; and the Court of Exchequer certified, that, if it was necessary or convenient for the use of the railway, they were authorised to make them(*a*), and thereupon the injunction was dissolved.

In the case before me I shall assume the question to be as to the building of the station only, because I am not satisfied upon the evidence that what is being done is necessary for the widening of the railway. The wall which the company are actually building is not for the widening of the piers, or to support the girders for the widening of the railway, and I must take it to be for the station only. [His Honour referred to the terms of the railway Act, as above given, and continued:—]

The company are not only empowered to make such works as were delineated on the plans and sections, but also such stations, works, and conveniences as were connected therewith. It is proved that there is an enormous quantity of traffic coming to this railway. It is said there are 300 trains a day passing, and the company require additional space for the accommodation of this traffic. [His Honour then referred to some other points not of public interest, and he read sect. 247 of the Metropolis Local Management Act, and continued:—]

The object of that is plain. There were numerous local Acts of Parliament relating to the metropolis, by which vestries, commissioners, and other bodies had certain powers given to them. These powers, by the Metropolis Local Management Act, were transferred to the new body; and this section proceeds to repeal all those Acts, although the

(*a*) 10 M. & W. 263.

powers vested in the old commissioners are transferred simultaneously with the repeal to the new managing body. The special railway Act, directing specific things to be done for the purpose of giving increased accommodation for the railway, not having the slightest analogy to any thing which was contained in the Metropolis Local Management Act, or to the powers or authorities vested by that Act in the managing body, cannot be considered to be within the purview of sect. 247. By sect. 244, it is said, that all the powers vested in the *Commercial-road* trustees are now vested in the managing body under the Metropolis Local Management Act; and that sect. 177 of the Act relating to the *Commercial-road* empowered the surveyor to be appointed by the trustees, from time to time to remove all obstructions to the road, in terms which would have enabled them to interfere with the building of this station, and the board of works claim the benefit of the power thus given to them under the Act relating to the *Commercial-road*. These are two special Acts of Parliament, both directed to the same locality. The clause giving to the *Commercial-road* trustees this power was before the Legislature in passing the special railway Act, as well as the Metropolis Local Management Act, because the railway company were obtaining the authority of Parliament for widening their bridge over the road, and they must have given notice of this to the trustees of the road. I must take the *Commercial-road* trustees either to have been present, or to have had the power to be present, at the time the Act for widening the railway was passed, and to have had an opportunity, if they had thought fit, of preventing any dealing with the property, which they must have known to have been close to the road which was under their control, and they might then, if they had thought fit, have insisted upon having the same power over it as had been given them by their general Act; but they have not done so.

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—
Judgment.

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 Judgment.

On these grounds I think that the whole object of the Legislature would be frustrated, if I held that the Defendants had the power to prevent the erection by the railway company of a station so obviously convenient, to say the least, if not actually necessary. But this is not the hearing, and I must take an undertaking from the Plaintiffs to abide by any order the Court may make at the hearing.

The Plaintiffs must pay the costs occasioned by the notice of motion, which they gave before amending their bill, as of an abandoned motion.

Nov. 14th,
 15th, & 24th.

LEWIS v. REES.

Deed—Con-
 struction—
 Contingent
 Remainders—
 Trust to pre-
 serve—Estate
 in Fee—Estate
 pur autre vie.

BY indentures of lease and release, dated 1778, being a settlement made subsequently to the marriage of *John Lewis* and *Anne* his wife, lands in the county of *Caermarthen*, and of which *John Lewis* was then seised in fee simple, were released and conveyed to *Jones* and *Nicholas*,

Limitation in a deed to trustees "and their heirs," (without words restricting it to the lives of preceding tenants for life), upon trust to preserve contingent remainders:—*Held*, that, although the omission of such words was probably an oversight, yet, the instrument being a deed, the Court could not construe the limitation as restricted, notwithstanding an estate in fee was a larger estate than was required for the purposes of the trust, and the limitation was repeated in a subsequent part of the deed, and was followed by a term of years in a third party, upon trust to raise portions, and by a power for the tenants for life to grant leases.

To justify the Court in restricting such a limitation by deed to an estate *pur autre vie*, it must be shewn that the intention of the parties, as manifested by the deed, cannot be carried into effect, unless the limitation be so restricted.

Distinction in this respect between deeds and wills. In the latter, a greater latitude is allowed in the construction of legal terms, the testator being supposed *inops consilii*.

Voluntary Settlement—Stat. 27 Eliz. c. 4—Fraud.

Purchaser for value from the heir not entitled, under 27 Eliz. c. 4, to set aside voluntary conveyance by ancestor.

Burrell's case (6 Rep. 72), explained, and *Jones (lessee of Moffett) v. Whittaker*, (1 Long. & Town. 141), observed on.

their heirs and assigns, to such uses as *John* and *Anne* should jointly appoint; and in default of such appointment to the use of *John* for life, with remainder to the use of *Anne* for life; and from and after the determination of the said several estates for life, by forfeiture or otherwise, to the use of the said *Jones* and *Nicholas*, "*and their heirs and assigns*," in trust to preserve and support the contingent estate and estates, uses and remainders, thereafter limited and created, from being defeated and destroyed; and for that purpose to make entries and bring actions, as occasion should require; but nevertheless to permit *John* and his assigns during his life, and *Anne* during her life, if she should survive him, to receive the rents and profits; and from and immediately after the decease of the survivor of *John*, and *Anne* his wife, to the use of *William Lewis*, his executors, administrators, and assigns, for a term of 100 years, upon the trusts thereafter mentioned; and after the determination of the term of 100 years, and without prejudice to the same, but subject thereto, to the use of *Thomas Lewis*, the son of *John Lewis*, and his assigns, for life; and from and immediately after the determination of that estate for life, by forfeiture or otherwise, to the use of the said *Jones* and *Nicholas*, and their heirs, in trust to preserve contingent remainders (ut supra), but nevertheless to permit *Thomas Lewis* and his assigns, during his life, to receive the rents and profits; and from and immediately after the decease of *Thomas Lewis*, to the use of the first and other sons of the said *Thomas Lewis*, successively in tail, with remainders over; and it was thereby declared, that the term of 100 years was limited to *William Lewis*, upon trust, by the ways and means therein expressed, to raise and levy, immediately after the decease of *John Lewis* and *Anne* his wife, the sum of 50*l.* for the portion of *Hester Lewis*.

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The indenture of release contained the usual powers for

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the several tenants for life to demise the premises for terms not exceeding twenty-one years.

In 1786, *John Lewis* died intestate, and leaving *Thomas Lewis*, his only son and heir-at-law; *Anne Lewis* died in 1792.

The power of appointment, limited by the settlement of 1778, was never exercised.

The 50*l.*, directed to be raised for the portion of *Hester*, was raised and paid. The term of 100 years became attendant upon the inheritance, and was afterwards extinguished.

By indentures of lease and release, dated 1793, being the settlement made previously to the marriage of *Thomas Lewis* and *Elizabeth* his first wife, and by a recovery suffered in pursuance thereof, *Thomas Lewis*, in consideration of the marriage, and of a portion of 150*l.* paid him by the father of *Elizabeth*, purported to settle the same estates to the use of himself for life, with remainder to *Elizabeth* for life, with remainder (subject to the terms for raising portions for younger children) to the first and other sons of the marriage successively in tail, with remainder to the daughters as tenants in common in tail, and if but one, then to such only daughter in tail, with remainder to his own right heirs.

There was issue of this marriage two children, *John*, who died in 1820, a bachelor, and a daughter, who died in 1843 intestate, and leaving the Defendant her eldest son and heir-at-law.

Elizabeth died in 1798; and, in 1800, *Thomas* married a second wife, by whom he had one son, *Henry*, who died, leaving the Plaintiff his heir-at-law.

In 1853, *Thomas Lewis* died, and, upon his death, the Defendant entered into possession of the premises.

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The bill charged, that the recovery suffered by *Thomas* was ineffectual to bar the remainders expectant upon his life estate, under the settlement of 1778. The prayer of the bill was for a declaration, that the Plaintiff was entitled as tenant in tail in possession under the settlement of 1778; and for the usual consequential relief.

It appeared, that, in 1828, *Thomas Lewis* and *Henry*, then his eldest surviving son, joined in mortgaging the premises for a term of 500 years to one *Evans*, to secure 140*l.* and interest; and the mortgage contained a covenant by *Thomas Lewis* (which, however, was never performed) to suffer a recovery "so as to bar the estate tail of the said *Henry Lewis*, and all remainders over, and enlarge the same estate tail into an estate in fee simple."

Mr. *Willcock*, Q. C., and Mr. *Renshaw*, for the Plaintiff:—

Argument.

The issue of the first son of *Thomas Lewis* being spent, the Plaintiff is entitled under the limitation in the settlement of 1778 to the second son and the heirs of his body.

It will be argued, that the Plaintiff's claim is barred by the recovery suffered by *Thomas Lewis* in 1793, before his first marriage, and when, therefore, all the remainders to his sons and daughters were contingent and destructible by his act; but that consequence was prevented by the limitation to trustees to preserve contingent remainders, which being to them "and their heirs and assigns," without any words restricting it to the lives of preceding tenants for life, vested in the trustees the whole legal fee, so that the remainders were equitable only, and consequently indestructible.

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It will be said, that the omission of words restricting the limitation to an estate pur autre vie was an oversight, and, an estate in fee being larger than was required for the purposes of the trust, the Court, in aid of an implied intention, will insert words so restricting it, as in *Doe dem. Compere v. Hicks* (a). But that case arose upon a will, and here the limitation is by deed; and where by deed an estate is limited in terms proper to create a fee, and there is not in the deed clear evidence of an intention so inconsistent with that limitation as to require its restriction, the Court cannot insert words for that purpose: *Colmore v. Tyndall* (b). There, as here, the purpose of the limitation was to preserve contingent remainders, and an estate in fee was, therefore, larger than was essential to the purpose of the limitation; and there also, as here, the limitation was needlessly repeated; but those circumstances were held insufficient to justify the Court in restricting the estate in the trustees to an estate for life. *Curtis v. Price* (c) will be cited; but there the limitation in fee to the trustees to preserve was followed by another limitation to the same trustees for a term of years,—“a limitation of a very distinct character, for important purposes, and which could not arise at all if the trustees had the fee in them. They were two inconsistent and incompatible limitations. One or the other must fail:” per *Alexander*, C. B., commenting on *Curtis v. Price* in *Colmore v. Tyndall* (d); and a contrary decision would have defeated the indisputable object of the deed: per Sir *William Grant*, M. R., in *Curtis v. Price* (e); and it was on a precisely similar ground, that the late case of *Beaumont v. The Marquis of Salisbury* (f) was decided. Both those cases, therefore, fall within the exception.

Two other, and independent, grounds of defence are in-

(a) 7 T. R. 433.

(b) 2 Y. & J. 605.

(c) 12 Ves. 89.

(d) 2 Y. & J. 622.

(e) 12 Ves. 101.

(f) 19 Beav. 198.

icated by the answer: *first*, that, by the 27 Eliz. c. 4, the settlement of 1778, being voluntary, is void as against the Defendant claiming as a purchaser for value from *Thomas*, the heir of the settlor; and *secondly*, the Statute of Limitations.

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The first of these grounds is untenable: *Parker v. Carter* (a), *Doe d. Richards v. Lewis* (b), *Doe d. Newman v. Rusham* (c). The ground on which the statute of Elizabeth avoids voluntary settlements in favour of a purchaser for value from the settlor is this, that the vendor had in him, at the time of the sale, an estate which, he could convey to such a purchaser: per Lord *Campbell*, C. J., in *Doe d. Newman v. Rusham* (d). "But it does not follow," Lord *Campbell* goes on to say, "that the settlor has any estate in him which he can convey to any *but* a purchaser for value. He clearly has not any such estate." Here, therefore, the heir, *Thomas Lewis*, had, in truth, no estate in him; and, therefore, could not possibly pass any to a purchaser (e).

Equally untenable is the defence attempted on the ground of the Statute of Limitations, the possession of *Thomas Lewis* being consistent with the limitations in the settlement of 1778 up to his death, which did not occur till 1853.

They cited also, in reference to the first point, *Rochfort v. Fitzmaurice* (f).

Mr. *J. Hinde Palmer* (in the absence of Mr. *Rolt*, Q. C.) for the Defendant:—

Even if the Defendant were bound by the voluntary

(a) 4 Hare, 409.

(b) 11 C. B. 1035.

(c) 17 Q. B. 723.

(d) 17 Q. B. 733.

(e) Id. 734, 735.

(f) 2 Dru. & War. 1, 16.

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settlement of 1778 (which we submit he is not), still he would be entitled to the estates in question. The Plaintiff has not shewn, that it was necessary, in order to effectuate the intention of the parties, that the trustees should take the fee. So far from that being capable of being shewn, it was manifestly the intention of the parties to restrict the estate in the trustees to an estate *pur autre vie*. The omission of the words requisite for that purpose was an oversight; and the Court, therefore, will read the instrument, although a deed, so as to carry into effect the intention of the parties. In this respect there is no difference between a deed and a will. In construing either, the question is one simply of intention.

The VICE-CHANCELLOR.—Lord C. B. *Alexander*, in *Colmore v. Tyndall*, seems to lay down a different rule. According to him, nothing short of an Act of Parliament can put words into a deed which are not there, unless you shew an intention, clearly and distinctly expressed in the deed itself, which must fail unless such words are introduced (a). If you shew that, it will be a different matter.

Mr. J. H. *Palmer*.—In *Colmore v. Tyndall*, the Court was not satisfied that it was the intention of the parties to restrict the estate in the trustees to an estate *pur autre vie*. And other authorities bear out the proposition, that, in construing a limitation of this kind, whether in a deed or will, if the intention be clear, it must prevail: *Sanders on Uses*, vol. 2, pp. 48 et seq.; and Sir *William Grant* in *Curtis v. Price* (b), commenting on *Doe v. Hicks* and *Venables v. Morris* (c). Here, as in *Doe v. Hicks*, “the intention must have been to limit only during the lives of the several tenants for life, as the settlor has repeated the limitation each time

(a) Per *Alexander*, C. B., 2 Y.
 & J. 622.

(b) 12 Ves. 100.

(c) 7 T. R. 342, 438.

that he limited estates for life :” per Sir *William Grant* in *Curtis v. Price* (a). Here, as in *Doe v. Hicks and Curtis v. Price*, “the object for which the estate was given to the trustees did not require it to endure any longer, the object being to preserve contingent remainders :” per Sir *William Grant* in *Curtis v. Price*.

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The VICE-CHANCELLOR.—In *Curtis v. Price*, Sir *William Grant* found also two clearly inconsistent limitations, both contained in the same deed—the limitation to the trustees, which purported to pass the fee, and a limitation to the same trustees for a term of years, which could not arise consistently with the estate in fee to the same trustees; and, as he says, the intention not only would not be answered, but would be contradicted.

Mr. *J. H. Palmer*.—That was one ground ; but Sir *William Grant* relied also on the other, viz. that there was no necessity to give the trustees more than an estate *pur autre vie* ; a circumstance which, as he says, distinguished that case from *Venables v. Morris*, where it was essential for the trustees to have the fee, and not merely an estate during the life of the wife, because the deed gave her a power of appointment; and, “in the execution of that power, she would have occasion to make contingent limitations ; and, therefore, the estate was very properly left absolute in the trustees to support those possible contingent limitations :” per Sir *William Grant* in *Curtis v. Price*.

The VICE-CHANCELLOR.—In *Wykham v. Wykham* (b), Lord *Eldon* scarcely seems to agree with Sir *William Grant* in that view of *Venables v. Morris*.

Mr. *J. H. Palmer*.—Here, not only was there no neces-

(a) 12 Ves. 100.

(b) 18 Ves. 422.

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sity for the fee being in the trustees, but the construction which would give them a fee is inconsistent and incompatible with the other provisions of the deed. This is shewn not merely, as in *Doe v. Hicks*, by the repetition of the limitation, purporting in terms to pass the fee to the trustees, which on the second occasion must be useless, if, on the former, it is construed strictly; but further, by two circumstances, which distinguish the present from every other case, and, as we submit, are conclusive in our favour, viz. first, the term of 100 years in *William Lewis*; and, secondly, the power reserved to each successive tenant for life to grant leases of the estate. In the former, the words of the trust “upon trust to raise and levy” clearly shew that *William Lewis* was meant to take the legal estate,—an intention inconsistent with the Plaintiff’s construction, that, under the preceding limitation, the fee passed to the trustees for preserving contingent remainders; and, with regard to the second, it is clear that the power was to grant legal, not merely equitable, leases.

For these reasons, we submit, that the Court will read the estate in the trustees to preserve contingent remainders, as restricted to the life of the survivor of *John Lewis* and *Anne* his wife; and, if so, the contingent remainders are legal, and the recovery suffered by *Thomas Lewis* was effectual to bar the contingent remainder of the Plaintiff: and, consequently, even under the settlement of 1778, the Defendant would be entitled.

[He then contended, that, even if the Court should be against him on the former point, the Defendant, as a purchaser for value under the settlement of 1793 from *Thomas Lewis*, the heir of *John*, was entitled under stat. 27 Eliz. c. 4, to set aside the settlement of 1778 as voluntary. Upon this point he cited *Burrel’s case* (a), and read Lord St.

(a) 6 Rep. 72.

Leonards' observations upon it, from the 8th edit. of his "Vendors & Purchasers."]

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The VICE-CHANCELLOR.—The facts in that case were very peculiar. The grandfather made leases to the father, who assigned them to trustees for his son, an infant, and with a colourable intent to pay debts. The grandfather died, the father entered and acted as owner, and neither the assignees nor the infant took any profit, or paid any debts. Then the father sold the fee, and covenanted that the lands should be cleared of all leases; and it was held, that the leases assigned in trust for the son, although created by the grandfather, were void against the purchaser from the father. That is Lord *St. Leonards'* statement of the case in his 11th edit. of the "Vendors & Purchasers" (a); and it is clear from that statement of it, that the circumstances were very peculiar. It was a kind of concurrent fraud in all the persons concerned. It is clear, from Lord *St. Leonards'* remarks in the edition I have cited, that he considers that case as having been decided as it was, in consequence of the deed being fraudulent; and that all he says in connection with it as to the right of heirs and devisees to set aside voluntary settlements, is confined to transactions really fraudulent, or fraudulently kept on foot. He expressly says, "The rule has never been carried to this extent, that a father's *bonâ fide* conveyance of the fee, or of any partial interest, although voluntary, can be set aside by a sale by the devisee or heir-at-law of the father. The rule properly confined to transactions really fraudulent, or fraudulently kept on foot, seems to be open to no solid objection, and it is not likely to be carried further" (b). It is quite clear that the rule must be so confined, otherwise the consequences would be most serious.

Mr. J. H. Palmer.—But Lord *St. Leonards* goes on

(a) Page 927.

(b) *Sugd. Vend. & Pur.*, 11th edit., p. 928.

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to cite, without disapprobation, a recent case in *Ireland*, that of *Jones (lessee of Moffett) v. Whittaker (a)*, where the contrary was held.

The VICE-CHANCELLOR.—That case was cited and overruled in *Doe d. Newman v. Rusham*; and you have the decision of the Court of Common Pleas, as well as that of the Queen's Bench, the other way.

Mr. *J. H. Palmer*.—Then, as to the third point, we contend that the possession of *Thomas Lewis* must be referred to the deed of 1793; and the Defendant shewing possession adverse to the Plaintiff ever since that date, is entitled under the Statute of Limitations.

The VICE-CHANCELLOR (to Mr. *Willcock*).—I shall not require a reply on *Burrel's case*, nor on the Statutes of Limitation. And as to Sir *William Grant's* observations in *Curtis v. Price*, it appears to me, that, looking to what Lord *Eldon* says in *Wykham v. Wykham*, and the distinction there taken between a deed and a will, I cannot hold that the circumstances of its not being necessary for the purposes of this limitation, contained as it is in a deed, that the trustees should take more than an estate pur autre vie, and of the limitation to them in fee being repeated, are sufficient to warrant the Court in cutting down what is expressly given to them, "their heirs and assigns." The question is, whether or not the additional circumstance of the term of 100 years being afterwards limited to the other trustee, *William Lewis*, is inconsistent with a previous limitation in fee to the trustees to preserve.

Mr. *Willcock*, Q. C., in reply.—It was not necessary, in order to carry into effect the intention of the parties in

(a) 1 Longfield & Townsend's Irish Excheq. Rep. 141.

limiting the term, that *William Lewis* should have the legal estate. Consequently, it is not necessary for that purpose to insert words as the Defendant contends; and, in construing a deed, words may never be inserted, unless they are necessary to carry out the manifest intention of the parties as shewn by the deed: *Colmore v. Tyndall*, and per Lord *Kengon*, C. J., in *Venables v. Morris*. Here, not only are the words in question unnecessary, but the insertion of them would sacrifice the general intent of the settlor, viz. that the settled estates should be enjoyed by the persons designated.

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Then, as to the power for the tenants for life to grant leases,—

The VICE-CHANCELLOR.—You need not address yourself to that point. *Isherwood v. Oldknow* (a) shews that the lessee would come in under the estate of the party by whom the power was created.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Nov. 24th.
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I have taken time to consider the question upon which I reserved judgment in this case, on account of the high authority cited by the Defendant's counsel in support of his proposition, that, in construing a limitation like the one in question, the Court will follow the same rule of construction whether the limitation be contained in a deed or in a will, and, in either case, will look at the whole instrument to see whether it be necessary, in order to carry into effect the intention of the parties, that more than an estate pur autre vie should pass; and, where no such necessity is apparent, will

(a) 3 M. & Selw. 382, 404, 405.

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construe the limitation, whether in a deed or will, as restricted to such an estate.

The question has arisen less frequently than might have been expected, considering the frequency of the error.—I say ‘error,’ because no one can doubt that the omission to add words restricting the limitation in question to an estate *pur autre vie* was an oversight.

The limitations in the settlement are these:—[His Honour read the limitations in the settlement of 1778, as stated above];—and the question upon which I reserved judgment is, whether, in construing this deed, the Court can read the first limitation to the trustees, “their heirs and assigns,” upon trust to preserve contingent remainders, as if words were added restricting that limitation to the life of the survivor of the preceding tenants for life.

With regard to the authorities upon this question, I am not aware that they have at present gone beyond what I am about to state.

In *Venables v. Morris* (a), Lord Kenyon, C. J., held, that, in that particular case, the trustees must be held to take the fee. In discussing that case, he assigns no reason for his decision; but in the subsequent case of *Doe v. Hicks* (b)—a case in which the instrument in question was a will—he says, he had come to that decision because “there” (meaning in *Venables v. Morris*) “it was absolutely necessary that the fee should be in the trustees,” giving as the reason, that the tenant for life had a power of appointment, and if, in exercising that power, she had introduced any contingent remainders, they might all have been defeated if the uses were not executed in the trustees. Then he adds this other

(a) 7 T. R. 342, 438.

(b) 7 T. R. 433, 437.

observation—which was also relied upon in argument, as shewing that a limitation like the present will be cut down, whether in a deed or in a will, unless it be shewn to be necessary in order to effectuate the intention of the parties, —“on the same principle, therefore, that it was necessary in that case that the trustees should have the legal estate,” (meaning the legal estate in fee), “to answer the intention of the parties, I think it is not necessary in this case, that they should take the legal estate for a longer term than during the lives of the tenants for lives, since this construction will best answer the intention of the testator.”

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In consequence of Lord *Kenyon* having made that statement as to the reasons for his decision in *Venables v. Morris* and *Doe v. Hicks*, Sir *William Grant*, M. R., refers to the case of *Doe v. Hicks* as supporting his judgment in *Curtis v. Price* (a),—where, as I shall presently shew, and as he himself observed in his judgment, it was absolutely necessary to construe a limitation to trustees and their heirs as restricted to the life of a tenant for life; for that limitation being followed by another to the same trustees for a term of years, which, as he says (b), could not arise if the former carried the fee, in order to give effect to the term, it was absolutely necessary to restrict the limitation in fee. Referring, however, in his judgment in that case to *Doe v. Hicks*, he describes it as a case very much in point, the limitation to trustees having there, he says, been construed to operate only for the lives of the tenants for life, upon two grounds, first, that the object for which the estate was given did not require it to endure any longer,—the object being to preserve contingent remainders; and, secondly, that the intention must have been to limit the estate, at least the party must have understood himself to be limiting it, only during the lives of the several tenants for life, as he repeated the limitation each

(a) 12 Ves. 89.

(b) Id. 101.

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time that he limited estates for life; and then he adds this passage, to which I was referred by the counsel for the defence, as shewing that there was no difference in this respect between the rules to be followed in the interpretation of deeds and wills, and that in both the fee will be cut down, unless shewn to be necessary to the purposes of the deed:—"That," he says, "I admit, was the case of a will: a case, however, a short time before upon a deed is there cited, which gave Lord *Kenyon* occasion to state the ground upon which the former case was decided more particularly than upon the argument of that case. The other case is *Venables v. Morris*, in which the Court held that they could not read the deed as if the words, 'during the life of *Hannah Morris*' were inserted. But Lord *Kenyon* stated the ground of the difference to be, not that the one case was upon a will, the other upon a deed; but that in the one case the construction was necessary to give effect to the apparent intention, in the other it was not necessary."

Now, in *Doe v. Hicks*, the devise was simply "unto," not "to the use of," the trustees and their heirs; and, according to the rule stated by *Parke, B.*, in *Barker v. Greenwood* (a), as applicable at the present day to the case of wills, the trustees under such a devise would take only so much of the legal estate as the purposes of the trust required,—in other words, would take only an estate during the life of the preceding tenant for life, that being all that was requisite for the purposes of the trust to preserve contingent remainders.

* When Lord *Eldon* had to consider this point in *Wykham v. Wykham* (b), he does not appear to have been satisfied with those observations of Lord *Kenyon* and Sir *William Grant* in reference to *Venables v. Morris*. He first adverts

(a) 4 M. & W. 429.

(b) 18 Ves. 395.

to the well-known distinction which has at all times prevailed as to the construction of deeds and wills, and which I have always understood to be this, that, although in both cases the Courts look to the intention of the parties, yet in construing a deed, unless there be in the deed some manifest contrariety or contradiction, rendering a different interpretation necessary in order to effectuate the intention of the parties, the Courts are guided by the strict legal meaning of words; but, in the case of a will, the testator is supposed to have been *inops consilii*, and on that ground a greater latitude is allowed in the construction of legal terms. After adverting to that doctrine as to the construction of wills, Lord *Eldon* goes on to make the following remarks in reference to the observations in *Venables v. Morris* and *Curtis v. Price*:—"I observe, in *Venables v. Morris*, Lord *Kenyon* had a good deal of difficulty to say that those words 'to trustees and their heirs' would not create a fee; and accounts for it in a subsequent case," (meaning *Doe v. Hicks*), "not by expressing an opinion that the estate could not be abridged even in a deed; but thus, that, in that case, he thought it necessary, as the Master of the Rolls in a subsequent case," (meaning *Curtis v. Price*), "seems to consider it, that the trustees to preserve contingent remainders should have an estate in fee, on account of the power of appointment the wife had. If that observation is duly applied to that case, the question becomes very material, whether, on account of such a power, a limitation in a deed is to be construed to import less than it expresses: a question which I cannot represent as quite settled. If the ground upon which it is there represented to be necessary to consider the estate as an estate in fee can be supported upon looking to the cases,—which, perhaps, is not quite to be admitted, considering that there was, prior to that power, an estate tail actually vested in the wife herself, subsequent to the limitation to those trustees, by virtue of which estate she would have been entitled to call for a conveyance from the trustees,—it appears to me

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very difficult to maintain the point, that, *in a deed*, this doctrine of implication is to be so applied."

That passage from Lord *Eldon's* judgment certainly does seem to me a strong authority, in opposition to what was pressed upon me, that there is no difference in this respect between a deed and a will.

In *Curtis v. Price*, Sir *William Grant*, no doubt, took notice of the circumstance, that it was not necessary, for the purpose of the trust, that the trustees should take more than an estate pur autre vie; but there was also in that case, as I have already remarked, this most important circumstance, making it absolutely necessary that the fee should be cut down. There the limitation of the fee to the trustees was followed by a limitation to the same trustees for a term of years, a limitation which could not arise at all, if the trustees had the fee in them by virtue of the preceding limitation. The two limitations were inconsistent and incompatible. One or the other must fail (a). And that circumstance was expressly relied on by Sir *William Grant* in adopting the Plaintiff's construction cutting down the fee. He says, after noticing the two limitations to the same trustees, "The intention not only would not be answered, but would be contradicted, unless the Plaintiff's construction is put upon the general words of the limitation to the trustees (b). And in a precisely similar case, *Beaumont v. The Marquis of Salisbury* (c), Sir *John Romilly*, M. R., followed that decision.

Then, in *Colmore v. Tyndall* (d), there was not only the circumstance that the estate given to the trustees was larger than seemed essential to its purpose; but there also, as here,

(a) See per *Alexander*, C. B., in
Colmore v. Tyndall, 2 Y. & J.
622.

(b) 12 Ves. 101.

(c) 19 Beav. 198.

(d) 2 Y. & J. 605.

the settlor had repeated the limitation in fee to the trustees to preserve,—a repetition which was unnecessary if they took the fee on the first occasion. But *Alexander*, C. B., said, that those circumstances, whether taken separately or even united, did not convey to his mind distinct evidence that it was the intention of the parties to the deed, that the trustees should take merely estates pur autre vie, and would not justify him in inserting words in order to diminish their estate. The second limitation to the trustees was not, he said, incompatible or inconsistent with the preceding one; and clearly it was not. All that could be said of it was, that it was a needless repetition, and that is all which can be said of the corresponding limitation here.

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Following that authority and *Wykham v. Wykham*, I must hold that it is not sufficient ground for restricting the estate here limited to the trustees, "their heirs and assigns," to an estate pur autre vie, that the estate so limited seems larger than was essential to its purpose, or that the limitation has been unnecessarily repeated.

In this case, however, two additional circumstances were relied upon in argument as taking the case out of the authorities I have mentioned, viz. the circumstance of a term of 100 years being limited to *William Lewis* subsequently to the limitation in fee to the trustees to preserve contingent remainders, and the power to grant leases reserved to the successive tenants for life.

With regard to the first of these, the term of 100 years, it is not, as in *Curtis v. Price*, a term limited to the same trustees to whom the preceding limitation purports to pass the fee, but to a distinct person; and I cannot say that such a limitation is incapable of taking effect as an equitable term.

And, as to the second circumstance, the leasing power in

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 {
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 —
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the successive tenants for life, my impression is, as I intimated during the argument on the authority of *Isherwood v. Oldknow*, that estates created by virtue of those powers would override all the other limitations in the deed, such estates taking effect out of the estate from which the power is derived, and enuring as limitations of the use in pursuance of the power (a). And even if that were not the case, the same argument would apply as that which disposes of the former objection as to the term in *William Lewis*, that such estates would be capable of taking effect as equitable terms.

It appears to me, therefore, that neither in the limitations which have been relied on by the Defendant's counsel as grounds for cutting down the limitation in fee to the trustees, nor in any other part of the settlement—and it is to the settlement alone that I can look in determining this question—is there anything indicative of an intention so incompatible or inconsistent with the fee being in the trustees, that it cannot take effect unless the fee be so restricted; and upon the authorities it is clear, that, unless such an intention be manifested by the deed, the Court is not justified in putting such a construction upon a limitation like the present.

The only remaining points raised for the defence are those upon which I did not hear a reply, viz. as to the Defendant's right to defeat the settlement of 1778 as being a voluntary settlement, and as to the Statute of Limitations.

As to the first, the Defendant claims under what he alleges to be a conveyance for valuable consideration, executed by the heir of the settlor. But I have no conception that any such claim can be sustained. I have no conception

(a) See per *Bayley, J.*, in *Isherwood v. Oldknow*, 3 M. & Selw. 404, 405.

that either an heir or a devisee can, by a conveyance for valuable consideration, set aside a settlement made by his ancestor or testator, however voluntary. The real truth is, as it was put by Lord Campbell in *Doe d. Newman v. Rusham*, that, in such a case, neither heir nor devisee ever had any estate to convey. The only ground for a contrary notion is that supposed to be found in *Burrel's case*; and it is clear from Lord St. Leonards' statement of that case in the last edition of his "Vendors & Purchasers," that *Burrel's case* was one of fraud; and the Judges, by deciding otherwise than they did, would have given effect to a fraudulent combination between the ancestor and heir to defeat the purchaser.

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As to the Statute of Limitations, it is clear that the statute would not bar until twenty years from the death of *Thomas Lewis*. For, here, independently of the consideration, that, *Thomas Lewis* being tenant for life under both instruments—the settlement of 1778 and that of 1793—his possession would be referred to the former, even if he had done no act in recognition of that instrument, I have the additional circumstance that the settlement of 1778 has been expressly recognised by *Thomas Lewis*. In 1828, *Thomas Lewis* actually dealt with this property as tenant for life under the settlement of 1778, executing a mortgage in that year with the concurrence of the son, through whom the Plaintiff claims, and covenanting to suffer a recovery to bar this very entail.

It appears to me, therefore, that all the points raised for the defence have failed, and there must be a decree according to the prayer of the bill, with this addition only, that the Plaintiff is entitled "for an equitable estate." And, as to costs, the title which the Defendant has attempted to set up was one acquired by tort, and it has failed: under these circumstances, the Defendant must pay the costs of the suit.

Decree accordingly.

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Jan. 17th.

IN RE SAUNDERS' TRUST.

*Settlement—
Construction
—"Unmar-
ried"—Hus-
band & Wife
—Personalty
—Statutes of
Distribution.*

In a settle-
ment, the ex-
pression "in
case she (the
wife) had died
intestate and
unmarried,"
—held equiva-
lent to "in
case she had
died intestate,
and a widow."

Accordingly,
under a limit-
ation, at the
wife's death, to
the persons
who, in the
event above
mentioned,
would have
been entitled
to her personal
estate:—*Held*,
her first hus-
band having
died without
issue, that her
children by a
second hus-
band, who sur-
vived her, were
the persons
designated.

Dictum on
this subject in
Smith v. Smith,
(12 Sim. 326,
327), disap-
proved.

BY an indenture of settlement, made shortly after the marriage of *Richard Saunders* and *Charlotte* his wife, 2400*l.* Consols then belonging to *Saunders*, and 500*l.* then about to be received by *Charlotte* or by *Saunders* in her right from the executors of the will of her late father, and all future moneys to be received by her or by *Saunders* in her right under the same will, were settled, as to the 2400*l.*, upon trust to pay the dividends to *Saunders* for life, and after his death to *Charlotte* for life, and after her death upon trust for the children of the said marriage; and in default of any such child, upon trust for the next of kin of *Saunders*, according to the Statute of Distributions; and as to the 500*l.*, and all other the moneys aforesaid, upon trust to invest as therein mentioned, and to stand possessed thereof, and of the stocks, &c. upon which the same should be invested, upon trust to pay the dividends to *Charlotte* for life, free from any control of her husband, and after her decease to *Saunders* for life; and after the decease of the survivor, upon trusts for the children of the marriage: And it was thereby declared, that, in case there should be no child of the said marriage, who, by virtue of the trusts thereinbefore declared, should become entitled to a vested interest in the last-mentioned sums, the same, or such part thereof as should not have been applied for the maintenance and advancement of any child of the said marriage by virtue of the trusts therein contained, should be "in trust for the person or persons who, at the time of the decease of the survivor of them the said *Saunders* and *Charlotte* his wife, would have been entitled to the personal estate and effects of the said *Charlotte*, in case she had died intestate and unmarried."

The trustees received the 500*l.*, together with an additional 100*l.*, under the will, and invested both sums in the purchase of 649*l.* 10*s.* 6*d.* Consols.

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In re
SAUNDERS'
TRUST.

Statement.

Saunders died, and there was no issue of his marriage. *Charlotte* afterwards married *George May*, and died, leaving two children by him, both infants.

The trustees having paid the fund into Court under the Act 10 & 11 Vict. c. 96, the infant children, by *May* their father and next friend, now presented a petition, praying that a moiety of the residue of the 649*l.* 10*s.* 6*d.*, after payment of costs, might be carried over to the separate account of each infant, and to have the dividends accumulated.

Mr. *Sandys*, for the Petitioners, contended, that the word "unmarried" was to be construed as referring to the first marriage, and to that only, and as equivalent to "not being at the time of her death the wife of *Saunders*," "not leaving *Saunders* her husband her surviving;" so that *Saunders*, but no after-taken husband, was excluded. If so, *May* as the second husband was entitled, and he waived his right in favour of his children.

Argument.

But if both husbands were alike excluded, the word "unmarried" being capable of two other interpretations, "a spinster," or "a widow," the Court would adopt the latter, and not deprive of their right to representation children, whom it could never have been the intention of the parties to the settlement to exclude.

He cited *In re Norman's Trust* (a) and *Pratt v. Mathew* (b).

(a) 3 De G., Mac. & G. 965.

(b) 2 Jur., N. S., 1055.

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 SAUNDERS'
 TRUST.
 —
 Argument.

Mr. *W. A. Collins*, for brothers and sisters of *Charlotte*, contended, that the word "unmarried" must be construed strictly, as equivalent to "without ever having been married," i. e. "a spinster." The limitation in question was precisely in the words recognised by Lord Commissioner *Shadwell*, as proper to designate the persons entitled under the Statutes of Distribution other than children: *Elmsley v. Young* (a) and *Smith v. Smith* (b). In the latter, the clause was "in trust for his next of kin according to the Statutes of Distribution, and as if he had died intestate;" and the Vice-Chancellor observes, "It is impossible to read the clause in which the ultimate trust is expressed, without seeing that the person who framed it has omitted one or two words, which are generally inserted in clauses of the like nature, and which have been at last adopted for the purpose of excluding any question. If the draftsman had only gone on to say, 'as if the said *Alexander Falconer* had departed this life intestate and unmarried,' then it would have been quite clear what was meant: *the children would have been excluded*. But there is an omission of those two words, which have been introduced for the purpose of determining what next of kin are to take The language which has been adopted by conveyancers, has been adopted for the purpose of excluding the question." In *Maberly v. Strode* (c), the Master of the Rolls says, "I do not know that the word 'unmarried' was ever used in that sense," (meaning in the sense of 'not married at the time,' 'a widow,' or 'widower'), "except in the single instance of the Statute upon Settlements, 3 Will. & M. c. 11 (d), where the Legislature certainly thought fit to use it in that sense; but there they used it with such additions as put the meaning out of all doubt;

(a) 2 My. & K. 787.

(b) 12 Sim. 326, 327.

(c) 3 Ves. 450, 452, 454.

(d) The words of the statute

are, "If any unmarried person, not having child or children, shall be lawfully hired," &c.

for, if it was not used in that sense, the man could have had no child or children. *But, notwithstanding it is so used there by the Legislature, the question here is, what is the common and usual meaning of it in a will, or the common acceptation of it in language? If legacies or annuities are given to unmarried daughters, which is a very common way, could they go to widowed daughters? Certainly it never has been so considered, and I believe is not the usual sense in which testators, or persons in common language, use it. It must mean such as have never had a husband at all. If that is the common acceptation, there is nothing in this will to induce the Court to put an unusual construction upon it." Accordingly, in a very recent case, *In re Thistlethwayte's Trust*(a), where there was a bequest of 1000*l.* to the testator's daughter at her mother's decease "if she should be then unmarried," the Lords Justices held, that the word "unmarried" must be construed as "never having been married;" and, the daughter having married in the lifetime of her mother, it was held that the legacy never became due.

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In re
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 TRUST.
 —
Argument.

In *Re Norman*, and in the other case cited contra, the construction was necessarily different; for, in the former, the settlement made no provision for children, and in both the strict construction would have excluded the very issue for whom the settlement was intended to provide. Here, there is an express provision for the children of the first marriage, and no second marriage was then in contemplation.

Mr. W. H. Melvill for the trustees.

A reply was not heard.

(a) 1 Jur., N. S., 881.

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In re
SAUNDERS'
TRUST.

—
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am satisfied, that, in this case, I am clearly bound by the decisions; and that those decisions,—if I may be allowed to say so,—are founded upon sound reasoning.

In the case of a will,—where a legacy is given by will to a daughter, who, at the date of the will, has never been married, and the gift is made to be conditional upon the legatee being “unmarried” at a given time, there it may well be that the testator is looking to the then condition and status of the legatee as a person who has never been married, and foreseeing the circumstances in which she will stand if that status and condition continue, and intends the bequest to be conditional upon her continuing in that status or condition. In such a case, the word “unmarried” would rightly be construed to mean “a spinster,” and not “a widow”(a).

On the other hand, in a settlement—where property has been settled, in the event of the wife dying in the lifetime of her husband, upon trust for the persons who at her death would have been entitled to her personal estate in case she had died intestate and “unmarried,” or “without being married,” there being no provision for the children who eventually survive her, it is clear that the motive is, not to prevent her marrying again in the event of her surviving her husband, but simply to exclude her husband, in the event of his proving the survivor, from claiming any part of her personal estate. In such a case, the expressions “unmarried” or “without being married,” would be held to mean “without having a husband at the time of her death,” not “without ever having had a husband;” “a

(a) See *In re Thistlethwayte's Trust*, 1 Jur., N. S., 881.

widow," and not "a spinster;" and children surviving their mother would be entitled.

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 In re
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 TRUST.
 —
 Judgment.

In the case of *Norman's Trust*, any other interpretation would have excluded the children of the marriage, on which the settlement was made:—a result manifestly contrary to the very object of the settlement.

It seems to me, that the passage cited from the judgment of Lord Commissioner *Shadwell* in *Elmsley v. Young* (a) has no bearing on the question. The dictum of the same Judge in *Smith v. Smith* (b) was more in point; but it appears to have been a dictum of the moment, not material to the question under consideration; and I cannot but think, that, had the case been argued so as to raise the question, the judgment of the Vice-Chancellor would have been in accordance with the view taken by the Lords Justices in *Re Norman's Trust*.

The singularity of the present case consists in this, that, here, the lady has been twice married, and the words in question occur in the settlement on her first marriage. The event for which it was obviously the intention of the parties to provide, was that of her first husband, *Richard Saunders*, surviving her; and the intention was, in the event of his so surviving, to exclude him from all claims upon her personal estate. There, no doubt, the intention stopped; and accordingly, it was argued, that, in the absence of any intention to exclude a second husband, the second husband of this lady is entitled. But it seems to me that the words of the limitation "in case she had died intestate and unmarried," are too strong to admit of that interpretation. It seems to me, that, however they may have

(a) 2 My. & K. 787.

(b) 12 Sim. 326, 327.

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In re
SAUNDERS'
TRUST.
—
Judgment.

been intended to exclude only a first husband, the effect of those words must be (as Lord *Cottenham* decided in reference to the somewhat similar limitation to the separate use of a woman (a), to revive as often as the lady may marry again, and to come into operation against all after-taken husbands.

I must, therefore, hold that the lady's second husband is excluded from claiming the fund in question; and that the persons designated are those who, at her death, would have been entitled to her personal estate in case she had died intestate and a *widow*,—in other words, that her children, not her collateral relations, are the parties entitled to the fund.

The order will be for a transfer of one moiety to the separate account of each of the infant Petitioners, and for investment of the dividends from time to time, with liberty to apply.

Ordered accordingly.

(a) *Tullett v. Armstrong*, 4 My. & Cr. 377, 405.

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NICHOLSON v. TUTIN. (No. 2).

Jan. 26th.

THIS case is reported on the hearing, ante, Vol. 2, p. 18. It now came on for argument upon a point adjourned from Chambers.

Trustee—Commission—Collecting Rents.

The suit was to carry into execution the trusts of a creditors' deed. The decree directed an account to be taken of the rents of the real estate, and of the proceeds of the sale of any part of the real or personal estate comprised in the deed, received by the Defendants *Tutin* and *Watson*, the surviving trustees, or either of them, or by any other person or persons, by the order or for the use of the said Defendants, or either of them; "and, in taking the said account, all just allowances are to be made."

Certain real estates, subject to incumbrances, the interest of which more than exhausted the rents, were conveyed by the mortgagor to trustees, upon trust for his creditors. After the execution of this creditors' deed, one of the trustees thereof was employed by the mortgagees as their agent, to collect the rents:—*Held*, that he could not be allowed any commission out of the rents.

The answer of the trustees to the bill denied that they had ever taken possession of the land; but stated, that one of them, *Watson*, immediately after the date and execution of the trust deed, as the agent of the mortgagees of the land therein comprised, received the rents thereof, and paid such rents in discharge, in the first place, of the sums due for interest on the first of the mortgages affecting the said premises, and then in payment, so far as the same would extend, of the interest of the subsequent incumbrances affecting the said hereditaments and premises; but that such rents were not sufficient for the payment of the interest on the several incumbrances thereon, and that, for purposes of security and convenience, when such rents were received by *Watson*, and were not immediately applicable in payment of interest on the said mortgages, such rents were paid to the account of the trustees at a bank, with the moneys arising from the sale of the personal property, and sometimes, when the interest became due before the rents

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 v.
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Statement.

were actually received, it was paid out of these moneys by the trustees.

The account carried into Chambers by the trustees comprised these receipts and payments in respect of the real estate, and it included a charge of 450*l.* by *Watson*, as commission for collecting the rents.

The question was, whether, under these circumstances, *Watson* could be allowed this commission.

Argument.

Mr. *W. R. Ellis*, for the Defendant *Watson*.

Mr. *Southgate*, for the Plaintiffs, was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It would be difficult to maintain this claim upon the evidence; but, independently of that, I think that upon principle the Defendant's claim must be disallowed. The answer states, that the three trustees did not receive the rents, but that *Watson*, as the agent of the mortgagees, received them, and therewith paid the interest of the first mortgage, and then of subsequent incumbrances as far as the rents would go, but that the rents were not sufficient to pay all such interest; and when the rents were received, and were not immediately applicable, they were paid to the account of the trustees at their bankers. On the other hand, there is a circumstance which bears strongly against this view of the transaction; the bankers' book is produced, and these payments are entered in it as moneys received by the trustees: and, in this state of things, I think it would be very unsatisfactory to make these allowances. To maintain a claim to commission, *Watson* must either

shew that he was appointed agent of the mortgagees prior to the creditors' deed, or that there was a special agreement, at the time of his accepting the trust, that he should receive a commission.

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TUTIN. (No. 2).
Judgment.

In one case before Sir *John Leach*, he held, that where the mortgaged property consisted of a number of small houses, a commission might be allowed to a mortgagee in possession, for the trouble of collecting the rents, without any special contract (a). *Watson*, however, in this case, not only does not say that he was appointed agent before the deed, but it is proved that he was appointed subsequently to the trust deed. I do not think that it is competent for a trustee to accept such a position, and to raise a claim of such an indefinite nature, unless there had been previously a special contract that he should have compensation, or such a case of necessity as would justify such a claim, if made by a mortgagee in possession. But the persons to determine whether or not there was such a necessity, or to make such a contract in this case, would be the trustees themselves, of whom *Watson* was one. He would have to decide concerning the commission to be allowed to himself. The case, therefore, falls within the principle laid down by this Court, namely, that it will not allow a person to put himself in a position where his interest will be inconsistent with his duty. Therefore on principle, independently of the question upon the evidence, the claim for commission must be disallowed.

(a) *Davis v. Dendy*, 3 Mad. 170.

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THE MARCHIONESS OF LONDONDERRY
v. BRAMWELL.

*Practice—
Motion for
Decree—En-
larging Time
—Cross-exami-
nation.*

The 15 & 16 Vict. c. 86, and the orders made in pursuance thereof, do not so far change the practice of taking evidence in equity as to make it essential that a Defendant should know all the Plaintiff's evidence before he adduces his own.

Therefore, the Court will not, on a motion for decree, enlarge the time for the Defendant to file his affidavits, simply to enable him to cross-examine the Plaintiff's witnesses before doing so.

But it would probably grant this indulgence if the Defendant could not afford the expense of a special Examiner, and if his application for an enlargement of time were made without delay.

THIS was a summons adjourned into Court from Chambers. The application was by the Defendant for an enlargement of his time for filing affidavits in opposition to the Plaintiff's motion for a decree in this suit. The notice of motion for a decree was given on the 18th of December, 1856; and by an order, dated the 2nd of January, 1857, the Defendant's time for filing affidavits was enlarged until the 23rd of the same month, and seven days after that date were given to the Plaintiff to file affidavits in reply. Subsequently, the Defendant's counsel advised that the Plaintiff's witnesses should be cross-examined upon their affidavits. The earliest appointment for this purpose that could be obtained at the Examiner's office, was for the 3rd of February, 1857.

The managing clerk of the Defendant's solicitor made an affidavit stating these facts, and also that it was material for the case of the Defendant, that the cross-examination should take place before the affidavits on behalf of the Defendant were filed.

Mr. Rolt, Q. C., and Mr. Elderton, for the Defendant:—

The 15 & 16 Vict. c. 86, ss. 38 and 40, and the 22nd and following Orders of the 7th of August, 1852, give the Defendant a right to cross-examine the Plaintiff's witnesses at any time within the fourteen days which are allowed to the

Defendant for filing his own affidavits: *Clarke v. Law*(a), *Williams v. Williams*(b). [Mr. Cairns, Q. C., for the Plaintiff—I do not deny that.] Then, if the Defendant has this right by the course of the Court, he ought not to be deprived of it by the accident, that the Examiner cannot take the evidence within that time, on account of the press of business before him. The theory of the statute and orders must be, that the Examiner is able to take the evidence, whenever he is applied to for that purpose, without delay; and the application now is, that the Court will, by enlarging the time, supply a defect in the working of its own machinery. The expediency of so doing is obvious, because the cross-examination may relieve the Defendant from the necessity of filing any affidavits.

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THE MARCHIONESS OF
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v.
BRAMWELL.
Argument.

Mr. Cairns, Q. C., and Mr. Giffard, for the Plaintiff, were not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The abstract question of right involved in this application is very important. It is necessary, for the purpose of answering it, to examine the statute and orders that have been referred to, in order to see whether this kind of postponement of the evidence was contemplated by the Legislature, or by the framers of the orders. I cannot find in the statute or the orders anything which would justify me in holding, that the mere wish to cross-examine the witnesses of the Plaintiff is a sufficient reason for postponing the time fixed for the Defendant to file his affidavits, on a motion for decree.

Judgment.

There is much convenience in the course of practice at common law, by which a Plaintiff has to make out his own

(a) 2 K. & J. 28.

(b) 17 Beav. 156.

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 CHIONESS OF
 LONDONDERRY
 v.
 BRANWELL.
 Judgment.

case by evidence, and then the Defendant produces his evidence in answer to the Plaintiff's case; but, remembering the former practice in this Court, according to which neither party could see the evidence of the other until he had completed his own, it is evident that the framers of the statute and of the orders had not any intention to assimilate the practice of this Court to that of the common law in this respect. Formerly, by the practice of this Court, great care was taken to prevent any publicity until the whole of the evidence on both sides was taken. There are some reasons in favour of that system, but the Legislature and the Court have not thought fit to persevere in it. The system has been altered, to some extent, by the stat. 15 & 16 Vict. c. 86, according to which evidence may be taken orally before the Examiner, and cross-examination upon affidavits may take place at once, and all evidence so taken is to be in the presence of the parties, their solicitors, and agents. Secrecy being thus put an end to, one mode of taking evidence provided by the statute and orders is, that when both parties wish to proceed upon evidence by affidavit, their affidavits are to be filed by a given day, and they are allowed to postpone filing them until that day. Clearly, therefore, it was not intended that one side should cross-examine the witnesses of the other before they filed their own affidavits. It was argued, that the different modes of taking evidence now allowed must be considered as experiments, none of which perhaps is abstractedly the best, but they are adapted to different cases. The fact, however, that evidence may be adduced in the manner I have just mentioned, shews plainly that it was not considered necessary for the purposes of justice that a Defendant should be able, in all cases, to cross-examine the Plaintiff's witnesses before filing his own affidavits.

In this particular case it is said now to be impossible. On a motion for decree, there is ordinarily an opportunity

of doing so. The Plaintiff's affidavits must be filed at the time of giving the notice of motion. The Defendant has fourteen days after receiving the notice to file affidavits in answer, and this affords him an opportunity of cross-examining the Plaintiff's witnesses before filing his own affidavits; but there is nothing in the statute or orders to shew that this was considered requisite, or that the Court ought to grant a Defendant further time, simply because he wanted to cross-examine the Plaintiff's witnesses, except in a special case where the Court might think it necessary.

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 THE MAR-
 CHIONESS OF
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 v.
 BRAMWELL.
 Judgment.

In this case, the Defendant now makes his application, on the ground that the time for filing his affidavits will soon elapse, and he believes that, if he were to cross-examine the witnesses, it would supersede the necessity of filing affidavits in answer. That is a reason in favour of granting the application, but not alone sufficient. The Defendant does not say positively that the cross-examination will make it unnecessary for him to file any affidavits, but that it may do so, or may alter the character of his affidavits. I do not think that this is a sufficient reason. There is nothing in the statute or orders to induce me to say, that the cross-examination in such a case is so expedient, that a Defendant ought not to be obliged to file his affidavits until he has been able to cross-examine. On the contrary, I find plain indications that such a course of practice was not contemplated.

This very case shews the wisdom of not laying down any such general rule. The Plaintiff's affidavits were filed on the 18th of December, and the Defendant must be taken to have been in a position to know whether it was necessary to cross-examine the Plaintiff's witnesses or not, long before this application was made. On the 2nd of January he applied for further time, and he obtained an enlargement of time until the 23rd; and that 2nd of January seems to be the latest day which he ought to be allowed to make up his

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v.

BRAMWELL.

Judgment.

mind on the subject; and, not having done so, then it would be anything but satisfactory to me to impose any further delay upon the Plaintiff. The Defendant will still be able to cross-examine the Plaintiff's witnesses, whatever order I now make. If a Defendant made such an application as this without any delay, and shewed to the Court that the expense of appointing a special Examiner would be very great in his particular case, that would be a sufficient ground for such an application; but no reason has been shewn in this case to justify me in making the order which is now asked.

*Jan. 26th.*

READ v. BARTON.

*Time to answer—Filing
evasive Answer
—Taking Answer
off File.*

A Defendant having several times obtained an extension of time to answer—once upon an affidavit that the answer would be ready in a few days,—filed at last a document answering only one immaterial interrogatory, hoping to gain time by driving the Plaintiff to file exceptions for insufficiency. On motion by the Plaintiff, this document was ordered to be taken off the file, and the Defendant was made to pay the costs of the motion, and all other costs occasioned to the Plaintiff by filing such an answer.

THE Defendant in this case, having several times obtained an extension of time to put in his answer, ultimately filed a short answer, admitting, but insufficiently, a deed which was not in dispute, but was common to the title of both parties, and not attempting to answer any other interrogatory.

This was a motion to take the answer off the file.



Mr. W. H. Terrell, for the motion, cited *Lynch v. Lecesne* (a), and *Brooks v. Purton* (b).

Mr. W. Morris, contra.

(a) 1 Hare, 626.

(b) 1 Y. & C. C. 278.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Following the example of the Lord Justice *Knight Bruce* in *Brooks v. Purton* (a), I wish to confine my observations to the facts now before me; and I must say, that I think this particular case is as clear a case as ever came before the Court, and that there has been as gross an abuse of the practice of the Court as I ever witnessed.

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—
READ
v.
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—
Judgment.

The Court allows, by its orders, a very short time for a Defendant to put in his answer, because in many cases this can be done easily within that time, and the general object of the orders is to bring litigation to a conclusion as soon as possible. But that time is always enlarged upon very slight grounds. The Defendant in this case, on the 19th of September last, obtained a month's further time to answer. Subsequently, fourteen days more were allowed him by consent of the Plaintiff; and again, with the Plaintiff's consent, fourteen days further were allowed. On the 25th of November, a summons for further time was taken out by the Defendant; this was adjourned till the 29th, and, on that occasion, an affidavit was made on behalf of the Defendant, and the Court was thereby informed, on the oath of the Defendant's solicitor, that there was difficulty in communicating with the Defendant, but that the answer would be filed in a few days. That, of course, must have meant an effective answer. Upon that representation, five days further time was given. After that, on the 2nd of December, the Defendant's solicitor wrote a letter to the Plaintiff's solicitor, stating, that he should be compelled to take out a further summons, because the answer would not be ready until the following Thursday, and he wanted a few days more time. It does not appear whether this application was acceded to or not. On the 5th of December, a sum-

(a) 1 Y. & C. C. 278.

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mons was taken out, on which, however, no proceeding was taken. On the 6th of December, the Defendant's solicitor wrote again, to say that the answer was exceedingly long, being upwards of 200 folios, and was very special, and that he could not have it ready in less than a week from that time; and that, if another week was not allowed him, the Plaintiff would oblige him to put in a short answer, to which exceptions could be taken, and this would occasion great expense. Now, this gentleman had some time before stated upon oath, that the answer would be ready in a few days. And I beg to say, that I entirely dissent from the view which the Defendant's advisers seem to have taken of what this Court will allow in such cases, or that Defendants can obtain further time by a proceeding of this nature. The Court had granted an extension of time upon the faith of an affidavit, which stated, that the answer was nearly ready. It appears that the Court was misled by that statement, and fourteen days afterwards, the answer was not in the condition which was represented. On the 15th of December another summons was taken out, returnable on the 18th. I suppose that this application was refused, because, on the 19th, the Defendant's solicitor wrote again to say, that he must have further time; and it was not until the 26th of December that he wrote to say, that he had filed an answer. Of course the Plaintiff thought that meant a proper answer; but, on the 27th, the Defendant's solicitor wrote to say, that the answer he had filed was not an ordinary answer, but only a short answer, to which he expected, of course, that the Plaintiff would except.

[His Honour then referred to a letter written on the 31st of December by the Plaintiff's solicitor, and observed, that he had doubted whether he had not thereby waived his right to object to the course taken by the Defendant, but thought, on the whole, he had not; and continued:—]

The thing called an answer purports to admit a document of title common to both parties. It is said, that even this is not properly admitted; but, assuming that it is, I am of opinion, that this is not such an answer as the Court had a right to expect when it was induced to give further time. The Court did not allow all this additional time, since the 17th of September last, to have a document at last put upon the file, called an answer, containing nothing but an admission of a fact not in dispute between the parties.

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It would be well for solicitors, and I may venture to add, also for counsel, to bear in mind, that, where time cannot be obtained upon a proper application, parties will not be able to obtain that time indirectly by such a course as has been pursued in this case.

I therefore order this document to be taken off the file, and the Defendant must pay the costs of the motion, and any costs properly incurred by the Plaintiff in consequence of such a document having been filed; I think that will include the costs of taking an office copy of the answer, because the Plaintiff could not have made the motion without seeing it.

1857.

Jan. 27th.

BURTON v. POWERS.

Will—Construction—Charge—Enlargement of indefinite Devise.

An indefinite devise of real estate by a will made before 1838 is enlarged into a fee simple by annexing a direction, that the devisee should pay a sum of money to another person, or by a declaration that the devise is "subject to his making" such payment, or by any other expression in the will shewing that the payment is to be made by the devisee out of the interest devised to him; because, if such interest were for life only, it might determine before it enabled him to make such payment.

But an indefinite devise before 1838, of real estate

to A., "after" or "subject to the payment out of the said premises" of a sum of money to another person, has not this effect; because the sum is then charged upon the whole fee simple, and nothing is given to A. until that charge is satisfied, and, consequently, no implication can be derived from the charge of an intention to enlarge A.'s estate.

AARON WHITE, by his will, dated in 1820, devised as follows:—"And I do hereby give to my wife *Nanny White*, all that house, shop, and garden, now in the tenure of *Benjamin Yates*, for her own sole use and purpose; and I also give to my wife *Nanny White*, all that messuage, farm, and premises, now in the holding of *Mr. Chambers*, situate at *Cakemore*, in that part of the parish of *Halesowen* which lies in the county of *Worcester* (except that half-acre of land now lying in *Upper Quinton* field, and now in the holding of my son *George White*), to hold to her, my said wife, during the term of her natural life; and from and after her decease, I give and devise the said messuage or tenement, and also the said farm and premises, given to my said wife for her life as aforesaid, to my son *John White*, subject to the payment, out of the aforesaid premises, of the sum of 50*l.*, to be paid to my son *George White*, and also the sum of 50*l.* to my daughter *Sally Powers*, and also the sum of 50*l.* to my daughter *Lucy Burton*, and also the sum of 50*l.* to my grandson *Edward Millward*; and I give and bequeath and order, that the rents or interest that is behind, due, and unpaid, shall go and be paid to that person I have left the estates and property respectively to . . . As to all the rest, residue, and remainder of my property whatsoever, or of what nature or kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my said wife *Nanny White*, and her children who have issue, share and share alike."

The testator died in 1822. *Nanny White* and *Sally Powers*, *George White*, *Lucy Burton*, and *John White*, her only children, survived him.

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The parties interested concurred in a special case for the opinion of the Court, on the question, what estate the said *John White* took under the devise contained in the will of the said testator *Aaron White*, hereinbefore set forth, in the hereditaments in such devise comprised?

Mr. *Rolt*, Q. C., Mr. *F. J. Wood*, Mr. *Morris*, Mr. *De Gex*, and Mr. *Jolliffe*, appeared for the several parties.

Argument.

They cited *Moore v. Denn d. Mellor* (a), *Doe v. Clarke* (b), *Roe v. Daw* (c), *Doe v. Garlick* (d), and *Doe v. Richards* (e).

VICE-CHANCELLOR SIR W. PAGE WOOD (after deciding that the devise to *John White*, if there had been no charge upon it, would, by the law applicable to wills made before 1838, have conferred upon the devisee a life estate only, continued as follows):—

Judgment.

The effect of charges upon the estate so given is entirely settled by authority. The gift is to *John White*, "subject to the payment out of the aforesaid premises" of several sums of 50*l.* each. The result of the authorities upon the construction of gifts of this kind is, that, if by a will made before 1838, real property is given to a person, and—which is the more common case—the will directs that certain payments are to be made by him during the continuance of

(a) 2 Bos. & P. 247.

(d) 14 M. & W. 698.

(b) 1 Cr. & M. 39.

(e) 3 T. R. 356.

(c) 3 M. & Selw. 518.

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his interest; or if the gift is to him, subject to certain payments to be made by him to other persons; or if the will contains any other expression to shew that the payment is to be made by the devisee during the continuance of his interest in the premises devised, and his interest, if only for life, might not be sufficient to enable him to make those payments; then the construction is by a necessary implication, that the devisee takes the fee simple. If, for example, he is directed to pay an annuity, the annuitant might outlive him; and, therefore, in that case the implication is, that he must take the fee simple. In any case, where a payment is to be made out of the interest given to the devisee, so that it is a charge upon the estate devised to him, that estate is to be measured by the possible, not the probable, amount of the charge, and if it may require the fee simple to provide for it, the fee simple is considered to pass to the devisee.

Or, there is another class of cases of which *Moore v. Denn* d. *Mellor* (a) is the principal authority, where the gift is to the devisee "after" satisfaction of some previous legacy, and there the devisee takes nothing until the legacy is satisfied. It is not a legacy given out of his interest, but it is an independent charge upon the same property, and not until after that charge is provided for is any interest given to the devisee. In those cases, the whole fee simple is subject to the charge; and whether the devisee takes a life estate, or more, the charge exists, and he takes no interest at all until provision for it is actually made; and, consequently, it cannot be inferred in any way, that the charge is to be paid out of the estate given to the devisee, it being in fact paramount thereto; and therefore his estate cannot be enlarged by any implication arising from such a charge.

That class of cases differs rather from this, because, in

(a) 2 Bos. & P. 247.

them, the charge was created before the devise was made, and then the estate was devised subject to the charge. In the leading case I have referred to, the devise was "after" payment of the charge. I cannot draw any distinction between a devise after payment and a devise "subject to" payment of a charge of this kind. I think that I am bound by the decisions referred to; and I must answer the question in this special case, by deciding that *John White* took a life estate only.

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DOUGLASS v. THE LONDON AND NORTH WEST-
ERN RAILWAY COMPANY.

Jan. 17th &
20th.

BY an agreement made the 5th of May, 1847, between *Douglass*, deceased, now represented by the Plaintiff, and the Defendants the company, under and by virtue of the powers and subject to the provisions of the company's Act, and the Lands Clauses Consolidation Act, 1845, *Douglass* agreed to sell, and the company agreed to purchase, for 62*l.* 17*s.* 6*d.*, the fee simple in possession of and in certain lands and hereditaments required by the company for the purposes of their railway, and all rights and interests there-

Lands Clauses Consolidation Act—8 & 9 Vict. c. 18, ss. 76, 77, & 79— Interpretation—Railways—Vendor and Purchaser.

A railway company takes possession of land under a contract for a sixty years' title.

The vendor fails to shew more than a possessory title for thirty-six years:—*Held*, that he cannot compel the company to deposit the purchase money in the Bank under the 76th section of the Lands Clauses Consolidation Act, 1845.

By the term "owner" in that section, the Legislature meant a person having some title; and in providing for the event of an owner "failing to make out a title to the satisfaction of the promoters of the undertaking," they had in contemplation the possibility of the land being subject to dower or jointure, or some other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title.

A surviving partner, selling partnership lands in discharge of his duty, as survivor, to wind up the partnership, is an owner within the meaning of the 76th section; and, by virtue of that and the 77th section, the promoters of the undertaking, depositing the purchase money in the Bank to the credit of the vendor and of the representative of his deceased partner, would acquire all the estate and interest of both.

A person in possession, but shewing a bad title, is not the "owner" within the meaning of the 76th section; and where the lands are in such possession, and the true owner cannot be found, the promoters must have recourse to the jury clauses of the Act:—*obiter*.

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in, free from all incumbrances, except tithe and land-tax; and it was agreed, that the said purchase should be completed on the said 5th of May, when possession of the premises should be given to the company; but if from any cause the said purchase should not be completed on the said 5th of May, then the purchase money should carry interest at 5*l.* per cent. until the purchase was completed. And it was further agreed, that *Douglass* should, within one month from the date thereof, deliver to the solicitors of the company an abstract of title to the said lands and premises, and produce the deeds, and other evidences, in proof of the same, but to such extent as the said solicitors should require, and not further; and that *Douglass*, and all other necessary parties, should make and execute all proper and necessary conveyances to the company, with covenants for title, and for production of deeds and other evidences not handed over to them according to the usual practice on the purchase of land.

No abstract of title was furnished on the part of the vendor; nevertheless, the company took possession of the lands, and constructed their railway upon them, and in such possession they still remained, but without having paid the purchase money.

In March, 1854, in reply to an application from the company requesting him to deduce a title to the lands, the vendor admitted that all the title he could shew, consisted of possessory declarations since the year 1820, when the lands had been purchased, partly with his own money, and partly with money provided by his then partner, one *Wartnaby*, who died in 1845; and that the purchase had been so made under an agreement, that it should be considered as made on the partnership account. Under these circumstances, he suggested, that the company should deposit the purchase money in the Bank, under the 76th section of the Lands

Clauses Consolidation Act, 1845 (a), and should then execute a deed poll under the 77th section. This proposal was at first accepted by the company, but was afterwards declined, the company having been advised that, owing to conflicting claims arising under *Wartnaby's* will, they could not acquire a good title by means of such deposit and deed poll.

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In December, 1856, *Douglass* (the vendor) died, having by his will devised all his real estate to the Defendant *Torkington*, upon certain trusts, in the will mentioned. The Plaintiff was the sole legal personal representative of *Douglass*, deceased.

The claim was for specific performance of the agreement of the 5th of May, 1847; for a declaration that the company had accepted the vendor's title, and that they might be ordered to pay the purchase money, and interest at 5l. per cent., to the Plaintiff, with the costs of the suit; or at all events, that the purchase money and interest might be deposited in the bank under the 76th section of the Act.

Mr. *Daniel*, Q. C., and Mr. *De Gez*, for the Plaintiff:—

Argument.

The company not having called for the Plaintiff's title within a month from the date of the contract, and having entered, and for nearly nine years remained in possession, although aware that the Plaintiff had only a possessory title, must be held to have waived any objection they might originally have been competent to raise; and the Court will declare that they have accepted the title as shewn, and will make a decree for payment of the purchase money, interest, and costs as claimed by the Plaintiff.

(a) Set out, *infra*, p. 178.

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At all events, the Court will direct the purchase money and interest to be deposited under the 76th section of "The Lands Clauses Consolidation Act, 1845." Such a deposit, if made to the credit of the Plaintiff, of *Wartnaby* the personal representative of the vendor's late partner, "and of all other persons (if any) interested in the lands," would secure the interest of and be binding upon, not *Wartnaby* only, but all such other persons; and, under the 77th section, the company, by executing a deed poll as there mentioned, would thereupon acquire all the estate and interest of all such persons, and would have a good title against all the world. As against *Wartnaby*, their title would be as good as against the vendor; and by the same reasoning it would be equally good against third parties (if any) having a better title than either, for the 76th section provides expressly for the case of an owner "failing to make out a title to the satisfaction of the promoters,"—words which would meet, not merely a case like the Plaintiff's, who has made out a possessory title for thirty-six years, but the case of a person in possession, but shewing a positively bad title. Even, in such a case, the promoters of the undertaking depositing the purchase money to the credit of the party in possession, of any other persons whom they believe to be interested (describing them so far as they can), and of all such other persons as may have that title which the vendor has failed to shew, the contract would, in the absence of fraud, be binding upon all; and with reason, for it is natural to suppose that a party in possession, and believing himself rightfully in possession, would make as good a bargain as if his title were absolute.

Mr. *Willcock*, Q. C., and Mr. *Speed*, for the company:—

The contract is for a sixty years title, which the Plaintiff cannot shew: specific performance therefore is impossible.

Equally impossible is it to contend, that the 76th section

can apply to the case of a person having a bad title. That section applies only to the case of "owners" of land, and the term "owner" is defined by the interpretation clause (a) to mean "any person who, under the provisions of this or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking,"—in other words, the rightful owner. A deposit under the 76th section would not even be binding upon *Wartnaby*, much less would it be binding upon third parties who may have a better title than either *Wartnaby* or the vendor.

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Mr. *Schomberg*, for the Defendant *Torkington*.

Mr. *Daniel*, Q. C., in reply:—

The definition of the term "owner," upon which the Defendants rely, is expressly confined by the clause in which the definition occurs, to the particular cases there mentioned, of which this is not one. The true definition of the term, as it occurs in the 76th section, is furnished by the 79th section, which in effect provides, that, in the whole of this group of sections, the party in possession is to be deemed the owner until the contrary is shewn to the satisfaction of the Court.

The term "owner," in the 76th section, cannot mean a person whose title shews him to be the absolute rightful owner, for such an owner could not "fail to make out a title to the satisfaction of the promoters."

If the Court cannot grant the relief as the claim is at present framed, it will give liberty to amend by making the claim in the alternative, "that the Defendants, the company, may be decreed either specifically to perform or to abandon the contract."

(a) Sect. 3.

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Mr. Willcock cited *Ex parte The Freeman and Stal-
lingers of Sunderland* (a).

Judgment reserved.

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Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In this case, the principal objection which the Defendants have raised to the Plaintiff's title (independent of their contention that they have a right, under the contract, to a full and complete title for sixty years) is, in respect of a claim of Mr. *Wartnaby*, the representative of the former partner of the vendor, who asserts that the lands were purchased for the benefit of the partnership, and were therefore to be considered as partnership property.

If that were the sole objection to the title, it is clear that the company would acquire a good title to this property,—a perfectly clear title as regards any claim to be made by Mr. *Wartnaby*, by depositing the money in the Bank, under the 76th section of the Lands Clauses Consolidation Act, 1845.

The true construction of the 76th section is this, that there are several cases in which the payment into Court may be made under that section. It says, first, "If the owner of any such lands, purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase money, or compensation, either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make-out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking," (that is one case);

"or if he refuse to convey or release such lands as directed by the promoters of the undertaking" (that is another); "or if any such owner be absent from the kingdom, or cannot, after diligent inquiry, be found, or fail to appear on the inquiry before a jury as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase money or compensation payable in respect of such lands or any interest therein, in the Bank, in the name and with the privity of the Accountant-General of the Court of Chancery in *England*, or the Court of Exchequer in *Ireland*, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court." And upon making that deposit, and executing a conveyance to themselves as provided by the 77th section, they become entitled to "all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited"(a).

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At first, I was struck with the observation, that, in the first of the three cases, for which the Legislature provide by the 76th section, they expressly mention the case of a person who, although he has made a sale, has failed to make out a title to the satisfaction of the promoters of the undertaking; from which it was argued, that the Legislature may even have gone so far as to contemplate the case of a sale by a person having a positively bad title, and may have intended to provide that even upon such a sale, the promoters of the company, not being satisfied with the title, should be at liberty to deposit the purchase money to the credit of the vendors, of any other person whom they believe to be interested (describing them so far as they can do), and of all

(a) Sect. 77.

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other persons who may have that title which the vendor has failed to shew.

But I think that cannot be the true construction of the section, for this reason: it is impossible to suppose that the Legislature could ever have contemplated that a person having a positively bad title, and who is merely in possession of land, should be at liberty, by his own agreement, to sell that land and to fix the price, adversely to another who may possibly be in a position to recover in ejectment the very next day. It is impossible to suppose that the Legislature could ever have intended that such a person, having a bad title, and being merely in possession, should be authorised to contract on behalf of the true owner to sell the lands, and yet that they should have omitted to insert in the Act a special clause to that effect.

The sounder construction, therefore, appears to me to be, that, where the party in possession has shewn a bad title, and the true owner cannot be found, the Legislature intended the promoters of the undertaking to have recourse to the jury clauses of the Act: they are to have an inquiry before a jury, and the true owner having been summoned, and failing to appear on such inquiry, the 76th section provides, that it shall be lawful for the promoters to deposit the purchase money in the Bank, to the credit of such owner (describing him so far as they can do), and upon their so doing, and executing a conveyance to themselves under the 77th section, all his estate and interest will vest absolutely in them, and as against such owner they will be entitled to immediate possession.

What, then, is the class of cases which the Legislature had in contemplation in making the provision for the event of an owner of lands failing to make out a title to the satisfaction of the promoters? To ascertain this, I look to the

7th section of the Act. The 7th section provides, that it shall be lawful for all parties being seised, possessed of, or entitled to any such lands as there mentioned, or any estate or interest therein, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose, whether they be trustees (amongst other instances there specified), or feoffees in trust for charitable or other purposes, and so on. Those therefore are the persons referred to in the 76th section as the "owners" of lands to be taken, or of any interest therein. The "owner" must have some title. Now, suppose the land in the hands of such an owner to be subject to dower, or to a rent-charge by way of jointure, or to any other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title:—in such a case the Court, as in *Esdaile v. Stephenson* (a), would consider the objection to be one, not of conveyance, but of title, and the certificate would be against the title, because the "owner" would have no control over the person in whom the supposed estate or interest is outstanding. To such a case, therefore, the 76th section is directly applicable. The "owner" contracts to sell the lands to the promoters of the undertaking, and being seised of the lands he was competent so to contract; but when the promoters apply to him for his title, he fails to make out a title to their satisfaction, by reason of the estate or interest of the doweress, jointureess, or other third party having such outstanding estate or interest in the land as I have supposed. In such a case, the 76th section comes in to their aid; the party seised is enabled to sell, the promoters of the company are empowered to deposit the purchase money to his credit, and to the credit of the doweress, jointureess, or other third party, and, by so doing, they obtain a clear title in respect of all

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(a) 6 Madd. 366; *S. C.*, as reported in Sugd. Vend. & Pur. 412, 11th edit.

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their estates and interests. The doweress, jointuress, or other party claiming an outstanding estate or interest in the land, could not have prevented the sale; but their estates and interests would have been obstacles in the way of the promoters, and from those obstacles the promoters are relieved by depositing the money under the 76th section.

In this case it is clear, that, so far as regards *Mr. Wartnaby's* interest, the gentleman who entered into this contract was competent to sell the property in question. Either he was the absolute owner (subject to the question as to the sixty years title), or else he was the owner *quà* surviving partner, whose duty it was to wind up the affairs of the partnership; who had a right therefore to sell, and who, if not competent to give a complete discharge, was, at all events, in a position to enter into the contract for sale. And, that contract having been entered into by him, if the company should now deposit the purchase money and interest in the Bank to the credit of the Plaintiff and of *Mr. Wartnaby*, it would be impossible for *Mr. Wartnaby* to dispute the contract for sale: all that he could dispute would be the Plaintiff's interest in the purchase money. *Mr. Wartnaby's* claim is precisely one of those which the Legislature had in contemplation in providing for the case of an owner of lands failing to make out a title to the satisfaction of the promoters, and the company, by depositing the purchase money to his credit, and the credit of the Plaintiff, and then executing a conveyance to themselves under the 77th section, would immediately have vested in them all the estate and interest of both.

As regards the argument which was founded upon the 79th section, all that the 79th section provides is this, that "If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of

such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shewn to the satisfaction of the Court."—That assumes that the purchase money has been already deposited in the Bank, pursuant to the provisions of the 76th section;—that this stage has been already reached; and all that it provides is this, that, where the purchase money has been so deposited by the promoters of an undertaking,—whether by reason of their not being able to find the true owner of the lands, or by reason of the existence of some outstanding estate or interest affecting the lands in the manner I have described, and making it necessary for them to have recourse to the provisions of the 76th section,—there, until the contrary is shewn, the possession shall not be interfered with, but the person in possession shall be deemed to be the owner until the contrary is shewn, and shall continue to enjoy the income of the property.

If the object, therefore, of the company be only to obtain a clear title against Mr. *Wartnaby*, I have no doubt their object will be perfectly attained by depositing the purchase money in the Bank under the 76th section. But, whether the Plaintiff has a right to insist on the money being so deposited, and on the company's accepting that title, is a different question. Here, unfortunately for the Plaintiff, the contract was, that the vendor should deliver an abstract of title, and produce the deeds and other evidences in proof of the same. It is true, that there follow the words, "but to such extent as the company's solicitors shall require, and not further." But, although the company's solicitors do not seem to have insisted on their right to a sixty years title, and although the company entered, and for seven years appear to have been satisfied that there was no probability of their possession being disturbed, still there is nothing to shew that they ever waived that right.

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It appears to me, therefore, that if the company are not satisfied with getting rid of Mr. *Wartnaby's* title, which they will clearly do by depositing the money under the 76th section,—if, not content with this, they still insist on the sixty years title, I cannot decree specific performance against them without making a like decree against the Plaintiff, and requiring the Plaintiff to make out that title which the vendor contracted to make out. The contract being for a sixty years title, I cannot allow the Plaintiff the option of waiving that contract, or compel the company to deposit the purchase money under the 76th section, and to take the title they will acquire by virtue of that deposit in lieu of the sixty years title, to which they have a right under the contract.

If the claim of the Plaintiff had been in the alternative, that the company should either perform *or abandon* the contract, I have no doubt as to the course which the Court would have adopted, for it is upon the faith of the contract, and upon that only, that the company are in possession.

It appears to me, therefore, that, if the company will not accept the Plaintiff's title, the right course will be to direct the cause to stand over for the Plaintiff to take such steps as he may be advised, whether by amending his claim, or filing a new claim or a bill, in order to bring that alternative distinctly before the Court.

The cause stood over accordingly.

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Jan. 16th &
30th.

THE Plaintiffs were the executors of the late Marquis of Hertford, who, by a codicil to his will, dated 1834, bequeathed as follows:—"My house in the *Regent's Park*, furniture, &c. I give to *Charlotte Leopoldina Strachan*, if she marries an *Englishman*, during her life; and then, on similar condition, to *Louisa Strachan*, the rent to be paid out of my personal estate, and also the taxes. While both continue unmarried, Lady *Strachan* may live in it, but none of them may sell the lease, which I wish to descend to *Charlotte* or *Louisa's* children. My executors to allow from my personal estate 100*l.* a year for repairs and paint; and if uninhabited any time, it may be let to acquire money to pay its own expenses. If all die, failing my conditions, this leasehold house, &c. will return to my heirs." By another codicil, dated July, 1835, the testator bequeathed as follows:—"As to my leasehold estates in the *Regent's Park*, linen, furniture, and entire contents, excepting one or

Will—Specific Bequest—Leaseholds—Damnosa Hereditas—Executor's Assent—Decree for Sale—Election.

Leaseholds, specifically bequeathed to married women successively for life, for their separate use, with remainder to infants, proved *damnosa hereditas*. The Court decreed a sale notwithstanding the executors had so far assented to the bequest as to put the

first tenant for life into possession.

And the second tenant for life, who had declined the property in specie, was *held*, nevertheless, entitled to a life interest in the proceeds of the sale, and that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession.

Specific Bequest—Purpose failing—Bequest maintained.

Where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved *modo et forma* as intended by the testator, still, if there is a clear intention on the part of the testator, that the benefit should be conferred—if the testator has excepted from the general property bequeathed to the residuary legatee, the property the subject of the specific bequest, for the benefit of the specific legatee, the latter is entitled to the benefit of the bequest, and to enjoy it in any manner he may think fit.

And where the purpose for which one of two bequests, given by will to the same parties, is expressed in the will to be for the better enjoying of the other, the mere circumstance that the legatees cannot enjoy the latter shall not deprive them of the benefit of the former.

Therefore, where the interest of a fund was directed to be laid out in payment of the rent and charges of leaseholds specifically bequeathed, and the leaseholds proved *damnosa hereditas*, and could not be specifically enjoyed, and were therefore sold by order of the Court:—*Held*, that the legatees were entitled, not only to the proceeds of the sale, but also to the interest of the fund set apart for the better enjoyment of the leaseholds in specie.

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two more family pictures and books I may have moved there, although entailed, and everything it and they contain, I am minded to bequeath, for her life, to *Charlotte Leopoldina Strachan* aforesaid, remainder to said *Matilda*, remainder to said *Louisa*, on condition they permit their mother, if again a widow, or separated or apart from her husband *Philip Picollillis*, to live and inhabit there during her life; and to the better doing so, I give my executors 8000*l.*, in trust to lay out and employ the interest in the payment of 200*l.* or guineas rent, and the charges on or about the said *Regent's Park* villa, repairs, paint, &c. &c. And I do hereby ratify and confirm my said will and codicils in all respects, except as far as the same is or are altered or varied by this codicil, or by any preceding one."

By another codicil, dated September, 1835, the testator declared as follows:—"All bequests to women I wish, like the Duke of *Queensberry's*, to be independent of present or future husbands' control."

Charlotte was married in 1837 to Count *de Zichy*; *Matilda*, in 1833, to the Defendant Count *Berchtoldt*; and *Louisa*, in 1841, to the Defendant Prince *Vicenzo Saint Antimo Ruffo*.

The testator died in 1842, leaving the Defendant, the present Marquis, his sole residuary legatee, and also his heir at law.

The house, in the *Regent's Park*, mentioned in the codicil of 1834, and the leasehold estates in the *Regent's Park*, mentioned in the codicil of July, 1835, were one and the same premises, and consisted of a villa, offices, and pleasure grounds, held by the testator under a lease, for the term of ninety-nine years from the 10th of October, 1825, at the clear yearly rent of 210*l.*; and of two pieces of ground held by the testator as tenant from year to year.

In December, 1844, the Plaintiffs gave up possession of the premises to the Countess *de Zichy*, who remained in possession up to the time of her death. They also set apart out of the assets of the testator, 7911*l.* 3*l.* per cent. Consols, the amount which then represented the bequest of 8000*l.* contained in the codicil of July, 1835.

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The Countess *de Zichy* died in November, 1851, without having had any child.

In October, 1853, the Plaintiffs filed their bill against the above-named Defendants, and the three infant children of the Princess *Louisa*, praying, that the rights and interests of the Defendants in the leasehold premises, and their contents, might be declared; and that, in case the Court should be of opinion that the Countess *Berchtoldt* was entitled for life only, and she should elect not to accept the leasehold premises, it might be declared to whom the same beneficially belonged during her life.

The cause was heard by the Vice-Chancellor in June, 1854(a), when his Honour declared, that the Countess *Berchtoldt* was entitled for her life only, and for her separate use, to the said villas and premises, with the furniture, linen, and entire contents thereof, with remainder to Defendant Princess *Louisa*, for her life, for her separate use, with remainder to the children of the last-named Defendant absolutely; and it was ordered, that an inquiry should be made, whether it would be for the benefit of all parties interested, that the premises should be sold.

The Chief Clerk having certified in the affirmative, the suit came on for further consideration in March, 1855, when it appeared to the Court that the income of the 7911*l.* Consols, the fund set apart for the payment of the rent and

(a) Reported, Kay, 646.

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charges on the leasehold premises, was wholly insufficient for that purpose; that, owing to the peculiar character of the house, there were no means of providing for the expense of keeping it up, and that the parties entitled for life, and in remainder, were in such a position that it was impossible for any of them to derive any benefit from the property so long as it remained in specie. It was therefore ordered, that the villa and premises, and such of their contents as should be found to have passed by the codicils, should be sold.

The leasehold premises and fixtures were accordingly sold in June, 1855, to one *Smith*, for 3460*l.* 18*s.* The chief part of the contents of the villa and premises were also sold by auction, and the amount laid out in the purchase of 5618*l.* 0*s.* 10*d.* Consolidated Bank Annuities.

Smith, being advised that, inasmuch as in the bill it was stated, that the Plaintiffs had assented to the bequest to the Countess *de Zichy*, and the decree having declared that the children of the Princess *Louisa* were entitled to the premises in remainder, and it appearing that such children were infants, the Court had no jurisdiction to order a sale, applied to be discharged from his purchase; and, by an order made on the 3rd of August, 1855, he was discharged accordingly.

The Plaintiffs then filed a supplemental bill, stating the foregoing facts, and stating by way of supplement, that the statement in the original bill as to the Plaintiffs' having assented to the bequest to the Countess *de Zichy*, was inadvertently inserted; that the Plaintiffs never did formally assent to that bequest, and never meant the possession of the Countess *de Zichy* to enure for the benefit of the persons entitled on her decease; and, submitting that, the interests bequeathed to the ladies being for their separate use,

the legal estate in the leasehold premises must necessarily be in the Plaintiffs as executors.

They further stated, by way of supplement, that since the death of the Countess *de Zichy*, they had paid out of the assets of the testator 1385*l.* 13*s.* 5*d.* in respect of the rent, insurance, rates, taxes, and repairs, and keeping possession of the premises, beyond or in excess of the dividends payable in respect of the 7911*l.* Consols; that the villa was now unlet and unproductive; and it was estimated that the average annual expense for rent and other incidental disbursements was more than 500*l.*, whereas, the income from the 7911*l.* 3*l.* per cent. Consols was only 221*l.* 10*s.* 2*d.* per annum, after deducting the property tax now payable; and that the Plaintiffs had no means of having repaid to them, as executors, or to the estate of the testator, the 1385*l.* 13*s.* 5*d.*, and the accruing future payments on account of the rents, taxes, rates, and repairs, except by a sale of the premises.

The supplemental bill therefore prayed, that it might be declared, that the Plaintiffs had a charge upon the leaseholds for the 1385*l.* 13*s.* 5*d.*, and for such other sums as they should thereafter pay in respect thereof in excess of the dividends on the 7911*l.*, until the leasehold premises should be sold, and that the premises might be ordered to be sold, and for consequential relief.

The circumstances stated by way of supplement were proved in evidence; and at the hearing of the supplemental suit, the Plaintiffs called on the Countess *Berchtoldt* to say, whether she intended to enter into possession of the property, she never having so done. The Countess declined to enter into possession, on the ground, that it was obvious that the leasehold property, in the shape in which it then existed, was a *damnosa hæreditas*; and the Court held, that the

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assent of the executors had been in every respect a qualified assent, and directed a sale.

The leasehold premises were accordingly again put up to auction, and in September, 1856, were sold, and the purchase money was invested in the purchase of 4508*l.* Consolidated Bank Annuities, which sum, with the 5618*l.* 0*s.* 10*d.* like Annuities, was paid into Court.

The cause now came on for further consideration.

Argument.
 ———

Mr. *Willcock*, Q. C., and Mr. *Schomberg*, for the Plaintiffs.

Mr. *Daniel*, Q. C., and Mr. *R. Pryor*, for the Countess *Berchtoldt*, contended, that the leasehold property having proved *damnosa hæreditas*, and having on that account been sold by order of the Court, the Countess, notwithstanding her having declined the property in specie, was entitled, as against the Princess *Louisa* and her children, to a life interest in the proceeds of the sale, and *that* without contributing towards the charges on the former, which accrued since she became entitled in possession.

They further contended, that the Countess, in common with Princess *Louisa*, was entitled to a life interest in the legacy of 8000*l.*, now represented by the 7911*l.* Consols in Court, as from the date of the sale, notwithstanding the failure of the purpose for which that sum was expressed to be bequeathed: *Hammond v. Neame* (a), and the case there cited of a bequest to bind the legatee an apprentice, where, though the purpose failed, the legatee was held entitled (b).

(a) 1 Swanst. 35.

and see 1 Jarm. on Wills, 326,

(b) *Barlow v. Grant*, 1 Vern.
 255; *Nevill v. Nevill*, 2 Id. 431;

and the cases there cited.

Mr. *Rolt*, Q. C., and Mr. *Erskine*, for the Princess *Louisa*;
and

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Mr. *Cairns*, Q. C., and Mr. *Vincent*, for the infant children of the Princess *Louisa*, disputed the claim of the Countess to a life interest in the fund in court: at any rate, she was not entitled to an interest in the proceeds of the leasehold villa, without contributing to the charges on that property which accrued since she became entitled in possession.

● The counsel for the Princess *Louisa* insisted, that she was entitled, for life, to the dividends on the 7911*l.* Consols, adopting, in reference to this part of the case, the arguments on behalf of the Countess.

Mr. *Chandless*, Q. C., and Mr. *Tripp*, for the Marquis of *Hertford*, contended, that the Marquis, as residuary legatee was entitled as against all the specific legatees, to the bequest of 8000*l.* The trust was simply to lay out the interest of that sum in paying the rent and charges on a house which had been sold; and, the subject-matter (*viz.* the house) being gone, the legatees of the house were not entitled to the interest of the 8000*l.* The case was not like that of a devise of a house in fee simple, with a bequest of a fund for the benefit of the devisees, for the perpetual repair of the house, for life; it was only a limited interest which the testator had created in the fund for a special purpose.

Judgment reserved.

Jan. 30*th.*
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The VICE-CHANCELLOR, SIR W. PAGE WOOD, now delivered judgment. He commenced by a brief recapitulation of the facts of the case previously to the hearing of the supplemental suit. After which, he proceeded to make the

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following observations in reference to the decree made at that hearing:—

At the hearing of the supplemental suit, the executors called on the Countess *Berchtoldt*, who was then entitled to the possession of the leasehold property as tenant for life, to say whether she intended to enter into possession of the property, she never having so done. The Countess, at that hearing, declined entering into possession, on the ground of its being obvious that the leasehold villa, in the shape in which it then existed, was a *damnosa hæreditas*,—a property which could prove beneficial neither to her nor to any one else, whether in remainder or otherwise, and the Court then considered itself justified in holding, that the assent of the executors had been, in every respect, a qualified assent. And the more I have considered it, the more it appears to me, that the Court was right in that conclusion, from the circumstance that the legal estate could never be divested out of the executors. This is a trust for the separate use of married women, and the Countess was married at the death of the testator. The legal estate, therefore, would always remain in the executors, and whatever assent they might give, whether qualified or otherwise, they would still continue to hold that legal estate, subject to a right in them to be indemnified by those who might choose to take the benefit of the specific bequest. They represent the residuary estate; as between them and the Crown (the lessor of the property, the subject of this specific bequest) the residuary estate was liable,—and, therefore, the Plaintiffs were liable,—to every charge accruing in respect of rent upon the property. From that liability it was absolutely necessary that they should have the means of relieving themselves; and such means they could not have by reason of the property being bequeathed to the separate use of these married ladies, with remainder over to infants. Accordingly, on the supplemental bill being filed, the Court directed a sale.

[His Honour then proceeded to deliver judgment upon the question reserved for further consideration, as follows:—]

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The sale having been made, a question now arises between the Countess *Berchtoldt* and those entitled in remainder. The Countess having declined to take possession, the question is, what is her interest in the money produced by the sale? Is she entitled to the income of that fund, without first contributing to such of the charges on the estate as accrued due since she became entitled in possession? And, secondly, there arises a question between the residuary legatee on the one hand and the Countess and those entitled in remainder on the other, as to which of those parties is entitled to the 8000*l.*, now represented by the 7911*l.* 3*l.* per cent. Consolidated Bank Annuities.

As regards the first of these questions, I have no hesitation in saying, that the Countess was perfectly justified in declining to take possession of property as to which the Court had previously arrived at the conclusion, that it could not be beneficially enjoyed by any of the specific legatees, except by means of a sale. The Court having previously decided that the property, *modo et formâ* as bequeathed, could not prove of any benefit to any of the specific legatees, it was impossible to expect the Countess to submit to have thrown upon her what must have proved an onerous burden, into whose ever hands the property might have come.

Then, is the Countess entitled to the income of the fund produced by the sale, without first contributing to such of the charges on the estate as accrued due since she became entitled in possession? I am of opinion, that she is so entitled. The real state of the case is this: the property was intended for the benefit of all the persons interested; but, in

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its specific state of existence, it proved to be *damnosa hæreditas*; no one of the specific legatees could occupy or use it in any manner which could make it a beneficial property; the real value could only be ascertained, and the real benefit could only be enjoyed, by means of a sale. If so, surely it would not be right to impose on the party who, for the time being, might be entitled to the property, as tenant for life in possession, the obligation of doing that by which all alike would be benefited, and the burthen of which, therefore, should be borne alike by all. The decision of the Court on the original hearing,—followed upon the subsequent hearing (although on a different ground, viz. that the executors required a sale for payment of the debts incurred)—has been, that the real mode of enjoying this property is by means of a sale, and taking it in the shape of money and not in specie; and that being so, and inasmuch as all the persons interested under the codicils would naturally come in to enjoy it, according to their respective interests, if it remained in specie, the Countess is entitled, during her life, to enjoy the income of the proceeds of the sale, without such life interest contributing towards the charges which accrued since she became entitled in possession.

The next question is as to the legacy of 8000*l.*, now represented by the 7911*l.* Consols. As to this, it was contended, on behalf of the residuary legatee, that, inasmuch as the trust was simply to lay out the interest of the 8000*l.* in paying the rent and charges on the house, the subject-matter, viz. the house, being now gone, the legatees of the house are not entitled to the interest of the 8000*l.*; and it was argued, that the case is not like that of a devise of a house in fee simple, coupled with a bequest of a fund for the benefit of the devisees in fee simple, for the continual repair of the house, the interest in this fund being only a limited interest created for a special and particular purpose. Now, without entering upon questions which may, and probably

will, ultimately arise between those entitled absolutely to the final remainder, after the death of the two tenants for life, one thing is clear upon the codicil: it was intended that the tenants for life, at least, should have the benefit of the interest of the 8000*l*. True, the fund was intended to be laid out for the better enjoyment of their interest in the leasehold property, but still they were intended to have the full benefit of the income during their lives. The testator bequeaths the house to *Matilda*, remainder to *Louisa*. He adds no condition that they should inhabit the house; but the condition is, that they should allow their mother, if again a widow, or separated or apart from her husband, to live and inhabit there during her life: and then he adds, "And to the better doing so, I give my executors 8000*l*., in trust to lay out and employ the interest in the payment of 200*l*. or guineas rent, and the charges on or about the said *Regent's Park* villa, repairs, paint," &c., &c. I think it cannot be disputed that those legatees, in whatever way they might have chosen to deal with or alienate their life interests in the house, would have been entitled to have the 200*l*. or 200 guineas rent paid; and the remainder of the income of the 8000*l*. laid out in keeping down the other charges mentioned in the codicil; and so far, of course, would have been entitled to alienate their life interests in the house, and yet to retain their life interests in the income of the 8000*l*., which life interests it would be competent to them, notwithstanding their having parted with their life interests in the house, to dispose, or to make use of as they thought fit. During the lives of the tenants for life, at least, (it would be impossible to say more while the Countess is alive), the testator intended they should have first the full benefit, as he supposed it would prove, of the occupation of the villa; secondly, the full benefit of the income of the 8000*l*., which he says is for their better occupation of the villa. Then, if so, I think the case falls precisely

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within the authority of *Hammond v. Neame* (a), and that general class of cases which establish, that, where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved *modo et formâ* as intended by the testator, still, if there is a clear intention on the part of the testator that the benefit should be conferred,—if the testator has excepted from the general property bequeathed to the residuary legatee the property the subject of the specific bequest, for the benefit of the specific legatee, the specific legatee is entitled to the benefit of the specific bequest, and to enjoy it in any manner he may think fit. And where, as here, the purpose for which one of two bequests given by will to the same parties is expressed in the will to be for the better enjoying of the other, the mere circumstance that the legatees cannot enjoy the latter bequest, is not to deprive them of the benefit of the former. It seems to me, therefore, that, so far as regards the ladies who were entitled for life to the enjoyment of the leasehold property, there being a clear intention on the part of the testator to give them the benefit of the interest of the 8000*l.*, although that interest was directed to be applied in the specific manner pointed out, still, as in the case of a bequest of a legacy for the purpose of binding the legatee an apprentice (b), or the like, notwithstanding the purpose has failed, the benefit of the bequest remains.

A question was raised, on the part of some of the parties interested, as to whether the capital of the 8000*l.* should not have been employed in keeping down the charges on the estate, when the income was found to be insufficient. I mentioned at the hearing, that I could not give any weight to that argument. The codicil is too clear. The interest only was directed to be laid out for this purpose, and beyond that interest it was impossible for the Plaintiffs to go.

(a) 1 Swanst. 35.

(b) *Barlow v. Grant*, 1 Vern. 255.

The result is, that I hold *Matilda* Countess of *Berchtoldt* entitled, during her life, to the income of the funds produced by the sale of the villa and its contents; and also to the income of the 8000*l.*, now represented by the 7911*l.* Consols.

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DECLARE, that the sums of money paid by the Plaintiffs, as executors of *Francis Charles Seymour Conway*, late Marquis of *Hertford*, the testator in the pleadings mentioned, for rent and other charges in respect of the leasehold villa and premises in the *Regent's Park*, in the bill mentioned, prior to the sale thereof, were, in the first place, payable out of the dividends that accrued due prior to such sale on the sum of 7911*l.* 3*l.* per cent. Consolidated Bank Annuities, representing the sum of 8000*l.*, directed by the codicil of July, 1835, to be laid out, and the interest whereof is directed by such codicil to be applied in payment of such rent and charges; and that so much of the moneys paid by the executors in respect of such rent and charges, as such dividends shall be insufficient to satisfy, together with the costs, charges, and expenses of the attempted sale of the said premises, and of the present sale, ought to be raised and paid by sale of a competent part of the 4508*l.* Bank Annuities, the produce of the sale of the said leasehold villa.

*Minute of
Decree.*

Declare, that the Countess *Berchtoldt* is entitled to receive, during her life, to her separate use, the dividends to arise from the 7911*l.* 3*l.* per cent. Consolidated Bank Annuities, and the dividend thereon, which accrued due in January last; and also the dividends on the residue of the 4508*l.* Bank Annuities, after such sale as aforesaid, and on the 5618*l.* 0*s.* 10*d.*, the produce of the sale of the furniture and contents of the said leasehold villa.

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March 2nd &
4th.

WHEELER v. HOWELL

*Will—Charge
of Legacies on
Real Estate—
Residuary
Devise.*

The principle of the decisions in reference to the question whether a charge on real estate is effected by reason of a residuary devise, is the same in the case of legacies as in that of debts, and is this, that where residuary real and personal property is given in one mixed fund to the executor, who is to pay debts and legacies, there legacies as well as debts are charged upon the real estate.

Testator, after bequeathing a legacy, and expressly charging part of his real estate with an

annuity to the legatee, devised and bequeathed all the rest, residue, and remainder of all and singular his real and personal estate (subject to his debts, funeral, and testamentary expenses) to trustees, whom he also appointed executors, upon certain trusts:—*Held*, following *Francis v. Clemow* (Kay, 435), that the legacy was well charged upon the real estate.

Statute of Limitations—3 & 4 Will. 4, c. 27, s. 42—Annuity—Arrears.

Arrears of an annuity charged on a reversionary interest in land,—*held* recoverable more than six years after the same became payable, the statute 3 & 4 Will. 4, c. 27, s. 42, having no application so long as the interest is reversionary.

Will—Construction—Maintenance—Power to raise—Implication of, from Context.

Power by sale or mortgage to raise money for maintenance implied from an unfinished clause in a will, purporting to provide for the event of a deficiency of funds for that purpose.

WILLIAM DAVIES, by his will, dated 1846, bequeathed to the Plaintiff the sum of 50*l.*, also an annuity of 52*l.* during her life, which annuity he thereby expressly charged upon all his real estate in the parish of *Churchstoke*, in the county of *Montgomery*; and, after directing the annuity to be paid half-yearly, and to be recoverable in like manner with rent reserved upon common demises, he proceeded as follows:—"And as to all the rest, residue, and remainder of all and singular my real and personal estate, whatsoever and wheresoever situate (subject nevertheless to the payment of all my just debts, funeral and testamentary expenses, and the expenses of proving this my will), I devise and bequeath the same, with their and every of their respective rights, members, and appurtenances, unto and to the use of my trustees hereinafter named, their heirs, executors, and administrators; in trust, nevertheless, for such of my children" (naming them) "as shall attain the age of twenty-one years, or shall die under that age (and leave issue living at his, her, or their death, or respective deaths), in fee simple, and absolutely, such children, if more than one, to take as tenants in common." The testator then empowered his trustees, during the minority of each of his children, to apply the whole, or such part or parts as they should deem expedient, of the rent or other income of the share to

which such child should be entitled under his will, of the said real and personal estate, in or towards his or her maintenance and education, or otherwise for his or her benefit during his or her minority; and directed his trustees to accumulate during such minority the unapplied income, by investing the same upon Government or real securities: after which the will proceeded as follows:—"And in case such rent, income, and accumulation should be deemed insufficient for the purposes aforesaid, I empower my said trustees or trustee, if they or he shall think it advantageous so to do, at any time or times during the minority of such child or children, by sale or mortgage of the whole or any part of the shares or interest of such child or children of or in the said real and personal estate as aforesaid" (*sic*). The testator then, without concluding the foregoing sentence, commenced another, by which he authorised his trustees, by sale or mortgage of his real estate, to raise sufficient to discharge his simple contract and specialty debts, with power to convey the trust estate, and give receipts for the purchase money: and he appointed *Jones* and *Owen* trustees and executors of his will.

The testator died in 1847.

At the time of his death, the testator was seised in fee simple in reversion expectant on the death of his mother (who was still alive) of lands in the parishes of *Churchstoke*, *Castle Caereinion*, and *Llanfair Waterdine*. But he left no other property, except a few articles of household furniture and personal effects of trifling value.

The bill was filed in 1855. It prayed for an account of what was due to the Plaintiff in respect of her annuity, then eight years in arrear, and to have the same raised by sale or mortgage; and for such directions regarding the interests of the Defendants, including the children of the testator, as the Court

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might think desirable, and as might be consistent with the true construction of the will.

Argument.

Mr. W. M. Giffard, for the Plaintiff:—

The legacy of 50*l.*, being followed by a residuary devise and bequest of the testator's real and personal estate, as a mixed fund, to his executors, who are to pay the debts and legacies, is well charged upon the testator's real estate, notwithstanding the previous charge affecting a portion of such real estate: *Bench v. Biles* (a), and see *Mirehouse v. Scaife* (b).

He also contended, that, notwithstanding the unfinished form of the sentence purporting to provide for the event of a deficiency of funds for maintenance and education, the Court, in aid of the obvious intention of the testator, would read the clause in question as a power for the trustees, by sale or mortgage, to raise money for that purpose.

Mr. Wood, for the Defendants, the children of the testator:—

According to the true construction of the will, the legacy of 50*l.* is not charged upon the real estate; the words "rest, residue, and remainder of all and singular my real estate," having reference to so much of the testator's interest in real estate as may not be required for raising the annuity.

As regards the annuity, the Plaintiff's claim to arrears is limited to six years by the 42nd section of the Statute of Limitations (c), which provides, that no arrears of interest in respect of an annuity can be recovered but within six

(a) 4 Madd. 187. (b) 2 My. & Cr. 695, 706. (c) 3 & 4 Will. 4, c. 27.

years next after the same respectively shall have become due.

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 WHEELER
 v.
 HOWELL.
 Argument.

Mr. *Karslake*, for other Defendants, took the same objection in reference to the arrears of the annuity.

Mr. *Daniel*, Q. C., as amicus curiæ, referred to *Snow v. Booth* (a), and the cases there cited.

Mr. *Beales*, for other parties.

[The VICE-CHANCELLOR was of opinion, that the statute did not apply to arrears of an annuity charged upon a reversionary interest in land, so long as the interest continued to be reversionary; but called for a reply on the other questions.]

Mr. *Giffard*, in reply, argued, that if the 50*l.* legacy had been a debt, no question could have arisen as to its being a charge, and the principle was the same in the case of legacies.

[The VICE-CHANCELLOR read Lord *Cottenham's* observations in *Mirehouse v. Scaife*, at pp. 706, 707 of the Report, and reserved judgment, observing, that *Bench v. Biles* was the only authority for holding a legacy to be thus charged, where the residuary devise was preceded by a specific devise of real estate, by reference to which it was possible to account for the use of the words "rest and residue."]

VICE-CHANCELLOR SIR W. PAGE WOOD:—

March 4th.
 Judgment.

As regards the question, whether the legacy in this case is charged upon the testator's real estate, I find I have already decided the point in the case of *Francis v. Cle-*

1857.
 WHEELER
 v.
 HOWELL.
 Judgment.

now (a), where, under circumstances similar to the present, I held the legacies to be well charged upon the real estate.

I admit that the question in that case was raised upon a motion to take the bill pro confesso, and was not argued. But, for that reason, I felt bound to take all the more care to come to a right decision.

There the testator, after giving some pecuniary legacies, devised a farm and lands to his wife for a term, and at a rent to be fixed by a third person; and then he gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, both real and personal, to his son, whom he thereby nominated his executor.

In that case I had at first some doubt, whether, where real estates had been previously devised, so that the term "residue" was not inapplicable to what was subsequently given, legacies could be effectively charged by the mere circumstance of the residuary form of the devise; but it seemed to me that the case of *Bench v. Biles* had gone that length, and, accordingly, after taking time to consider the point, I followed that decision.

I see by the report, that I referred to the case of *Bench v. Biles*, and also to that of *Mirehouse v. Scaife*, and observed, that, although, having regard to what Lord *Cottenham* says in the latter, *Bench v. Biles* seemed to be the only authority directly in point, I must follow it in the case then before me.

In the present case, I feel that I should be only introducing a useless and mischievous distinction if I held the legacy to the Plaintiff not to be a charge, the principle of the decisions being, in truth, the same in the case of legacies as in

that of debts, viz. that where residuary real and personal property is given in one mixed fund, to the executor who is to pay debts and legacies, there legacies, as well as debts, are charged upon the real estate.

1857.
 WHEELER
 v.
 HOWELL.
 Judgment.

As to the other point on which I reserved judgment,—the question as to maintenance and education, it stands thus: The testator empowers his trustees, during the minority of each of his children, to apply the whole, or such part or parts as they should deem expedient, of the rent or other income of the share to which such child should be entitled under his will of the said real and personal estate, in or towards his or her maintenance and education, or otherwise for his or her benefit during minority; and then, after directing accumulation of the unapplied income, he says this: "And in case such rent, income, and accumulation should be deemed insufficient for the purposes aforesaid, I empower my said trustees or trustee, if they or he shall think it advantageous so to do at any time or times during the minority of such child or children, by sale or mortgage of the whole or any part of the shares or interest of such child or children, of or in the said real and personal estate as aforesaid" . . . —and there he stops, and goes on to another subject. I think, however, that the expression is strong enough to shew, that what the testator intended was to empower his trustees, in the event of such insufficiency as he has supposed, by such sale or mortgage as he has directed, to raise what shall be sufficient for maintenance. It seems to me, therefore, that there is that power in the trustees.

There must be a declaration that both the legacy and the annuity, and also the arrears of the annuity, are well charged on the testator's real estate, and that there is power to raise money for maintenance by sale or mortgage.

Decree accordingly.

1857.

*March 2nd.*ARTHUR *v.* THE MIDLAND RAILWAY
COMPANY.ARTHUR *v.* THE LONDON AND NORTH WEST-
ERN RAILWAY COMPANY.

*Stock—Rail-
way Shares—
Transfer—
Fictitious
Name.*

Where an in-
testate had
executed
transfers of
railway shares
and stock to a
fictitious per-
son, the Court,
on a bill filed
by his admin-
istrator, de-
clared that the
intestate used
the fictitious
name as an-
other designa-
tion of himself,
and that the
Plaintiff, as
his adminis-
trator, was en-
titled to trans-
fer the shares
and stock, and
to receive the
dividends
thereof.

IN the year 1847, *James Frank* executed transfers of cer-
tain shares and stock, to which he was entitled in the
above-mentioned companies, to *James Trent*.

The transfers appeared to be duly attested.

James Frank died in 1855 intestate.

The bills were filed by his administrator, to have it de-
clared that the Plaintiff, as the administrator of the intes-
tate, was entitled to the shares and stock.

It appeared in evidence that there was no such person as
James Trent; that the name *James Trent* had been used
and the transfers executed by the intestate, with the view
of protecting the property from his creditors, and that the
name of the attesting witness, appearing to be subscribed to
the deeds of transfer, had been written by the latter upon
blank sheets of paper to oblige the deceased.

The deceased, notwithstanding the execution of the deeds
of transfer, was in the habit of receiving the dividends
up to the time of his death, and the signature "*James
Trent*," appearing in the transfers and on the dividend
warrants, were in his handwriting.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Rodwell*, for the Plaintiff, now
asked for a declaration in terms of the prayer of the bill.

[The VICE-CHANCELLOR referred to *Green v. The Bank of England* (a), where a bankrupt had invested money in the purchase of stock in the Bank of England, in a fictitious name, for the purpose of defrauding his creditors; and Lord Abinger, C. B., on a bill filed by the assignees, ordered the Bank to erase from their books the fictitious name, and insert that of the bankrupt.]

1857.
ARTHUR
v.
THE
MIDLAND
RAILWAY Co.
&c.
Argument.

Mr. Rolt, Q. C., relied upon that authority, but submitted, that in the present case the form of the declaration, as prayed, would be more convenient.

Mr. Willcock, Q. C., and Mr. Speed, for the Defendants,

Were prepared if the Court was satisfied on the evidence, to consent to the decree sought by the Plaintiff.

The VICE-CHANCELLOR, SIR W. PAGE WOOD, made a decree in the following form:—

DECLARE, that the intestate *James Frank* used the name of *James Trent* as another designation of himself; and that the Plaintiff, as the administrator of *James Frank*, is entitled to transfer the shares and stock in question, and to receive the dividends thereof.

Minute of
Decree.

(a) 3 Y. & C. Exch. 722.

1857.

Feb. 27th &
March 2nd.

*Will—Con-
struction—
Supplying
Words—Rela-
tive Words.*

The Court may supply words in a will where the context shews, by a necessary implication, what are the words omitted, and unless they are supplied there would be an intestacy.

So, where there is a gift by will, and then a gift over not commensurate with the original gift, the Court will curtail the general words of the gift over, by supplying words of reference; as where the first gift is to A.'s children, and the gift over is in default of issue of A., the Court will read the gift over as though it were in default of "such" issue.

HOPE v. POTTER.

FRANCIS THEAKSTON, by his will, dated in 1830, devised his messuage and dwelling-house, with the appurtenances, in the city of *York*, to his wife, for life; and from and after her decease, unto her daughter *Charlotte Theakston Driffield*, her heirs and assigns, for ever; but in case the said *C. T. Driffield* should die under the age of twenty-five years "without having left any child or children her surviving," then, and in that case, he gave the same premises to trustees in fee, upon the trusts thereafter declared concerning the residue of his real estate. And he gave and devised to the same trustees in fee all other his real estate whatsoever and wheresoever, in trust, to receive the rents and profits thereof and pay the same to the said *Charlotte Theakston Driffield*, for her separate use; and from and after her decease, then in trust that they his said trustees, and the survivors or survivor of them, his or her heirs, executors, or administrators, should "convey, assign, and assure the same hereditaments and premises unto and equally amongst *such* child or children of the said *Charlotte Theakston Driffield*, his, her, or their heirs, executors, administrators, and assigns, if more than one, as tenants in common, and not as joint tenants, the rents and profits in the meantime arising from the same premises to be applied by my said trustees towards their maintenance and education dur-

But where there was a devise of a particular property to the testator's daughter *A.*, her heirs and assigns, and if she should die under the age of twenty-five years "without having left any child or children," over; and, subsequently, a devise of other real estate to trustees in fee, in trust for *A.* for her separate use; and after her death, in trust to convey the same "unto and equally amongst *such* children of *A.* as tenants in common, the rents and profits in the meantime to be applied for their maintenance; and in case *A.* should die without leaving any child or children, or, leaving such child or children, all should die under twenty-one," over:—*Held*, that the Court could not, after "such children of *A.*," supply the words "as should attain twenty-one," but was at liberty as against the testator's heir to construe the word "such" as relating to all the children of *A.*, as they had been mentioned in the previous limitation.

ing their respective minorities; and in case the said *Charlotte Theakston Driffield* should die without leaving any child or children, or having such child or children all such should die under the age of twenty-one years, then in trust that they my said trustees, or the survivors or survivor of them, his or her heirs, executors, or administrators, should convey, assign, and assure the same hereditaments and premises" unto such of his near or distant relations as the testator's wife, by her will, should appoint; and in default thereof, and subject thereto, for such of his nephews and nieces as should be then living, in equal shares, their respective heirs, executors, administrators, and assigns.

1857.
HOPE
v.
POTTER.
—
Statement.

The testator died in 1830.

Charlotte Theakston Driffield intermarried with *Thomas Nursaw*, and had by him seven children. She died in the month of May, 1846. One of her children, named *Charlotte Nursaw*, died in her lifetime, under age, and without having been married. Another, named *Alfred Nursaw*, survived his mother, and then died under age.

This was a special case, in which the trustees of the will were Plaintiffs, and the surviving children of *Charlotte T. Nursaw* and the representatives of the deceased children were Defendants; and the questions were, whether the seven children of the said *Charlotte Theakston Nursaw*, or any and which of them, took vested interests under the above gift immediately upon their births respectively, or what interests they took under such gift.

Mr. *J. T. Humphry*, for the trustees.

Argument.

Mr. *Prendergast*, for the surviving children, and the heir of the testator:—

The gift to "such" children of *C. T. Driffield* is insensivol. III. P K. J.

1857.
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 v.
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 —
Argument.

ble, without supplying some words, because the word "such," as it stands, has no antecedent. The context of the will shews so clearly that the words "as should attain the age of twenty-one years," have been omitted by accident, that the Court can supply those words: *Spalding v. Spalding* (a), *Abbot v. Middleton* (b). Then the children who died under age take no interest.

Mr. Brodrick, for the representatives of the deceased children:—

The word "such" refers to all the children of *C. T. Driffield* who were previously mentioned in the will: *Strutt v. Braithwaite* (c); so that the share of each child vested at its birth. The gift of the income in the meantime for their maintenance assists this construction: *Jones v. Mackilwain* (d).

Mr. Amphlett, for other parties in the same interest:—

Words cannot be supplied, unless the context points out the very words which should be so supplied by a necessary implication. That is not the case here.

Mr. Prendergast, in reply.

Judgment reserved.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD (after stating briefly the terms of the will,) continued:—

It is obvious that this will is not very accurately expressed. The contest is, whether or not the children all took vested interests expectant on their mother's death. This lady married, and had a family, and some of her

(a) Cro. Car. 185.
 (b) 1 Jur. N. S. 1126.

(c) 5 De G. & S. 369.
 (d) 1 Russ. 220.

children attained twenty-one, and others died infants, in her lifetime and since her death. It has been argued, that the Court should supply certain words after the word "such," which is in general a relative word, so as to limit the vesting of the interest in the children to some contingency or other, and the particular contingency suggested is, such children as should attain the age of twenty-one years.

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HOPE
v.
POTTER.
Judgment.

With regard to the discretion of the Court to supply words in a will, the cases are very numerous, but I think they may be classed under two heads: The first is, when the will is in itself incapable of bearing any meaning unless some words are supplied, so that the only choice is between an intestacy and supplying some words; but even there, as in every case, the Court can only supply words if it sees on the face of the will itself clearly and precisely what are the omitted words, which may then be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy. The second class of cases is like *Spalding v. Spalding* (a), where there is a clear and precise gift, and a contingent limitation over, which is clearly expressed, but is not commensurate with the previous gift, the contingency being either in excess, as in many of the cases where the gift over has been upon a death without issue, and the Court has thought itself at liberty to curtail that gift over, by introducing the word "such" issue, or where there has been a defect, as in *Spalding v. Spalding* (a) and *Abbot v. Middleton* (b), where the limitation has been to one for life with remainder to his children, or to one in tail with a limitation over on a contingency, and the Court has held the gift over to be by way of substitution for the original gift, in the event of the original gift failing, and has found the contingency too narrow to fit that event, and has thought itself at liberty,

(a) Cro. Car. 185.

(b) 1 Jur. N. S. 1126.

1857.

HOPE

v.

POTTER.

Judgment.

from the whole context of the will, to supply words, there being a necessary implication that the gift over was intended to be reduced so as to suit the previous gift.

It has not been argued, in this case, nor could it be argued, that, unless words were added, there would be an intestacy, though the heir-at-law is a party to the suit. Then the question is, whether the Court can find, on the face of the will, enough to enable it to give a sensible meaning to the words; for, if it can, the Court is not at liberty to avail itself of this hazardous course of supplying words; nor do I see, supposing that I had been put in that difficulty, how I could safely have supplied the words which have been suggested. That some words have been omitted seems to be very probable, from the fact of there being a direction to convey to "such" children, and that the rents and profits in the meantime should be applied for their benefit during their minorities; but I must have a clear conviction, amounting to a necessary implication, that the words which I am called upon to supply are the proper words, otherwise I am not at liberty to supply them. There is a great difficulty in what I am asked to do here, namely, to insert words making the gift to such children "as should attain the age of twenty-one years." The limitation is to the children of a lady, with a gift over on all those children dying under twenty-one, and there is no gift over in the event of any of them attaining twenty-one. There would be a very strong reason for concluding from this, that the words suggested are the proper words to be inserted; but the case does not rest there, because there is a previous gift to *Charlotte Theakston Driffield*, for life, and then a gift over if she should die without leaving any child or children, or having such child or children all should die under the age of twenty-one years; and, by the same argument, I ought to insert in the intermediate gift to her children the words "as should survive the mother and attain twenty-one." That would be

the exact correlative of the terms of the gift over; but this would be going much too far. Those are the only words which could be introduced into the original gift, so as to make it exactly consistent with the gift over; but we constantly see wills in which there is a limitation to persons to vest at twenty-one, and yet a gift over if all die during the lifetime of the tenant for life. So that the somewhat unreasonable result is continually occurring, that there are several children who all attain twenty-one during the lifetime of the tenant for life; but, if no child survives him, all the shares become defeasible. I cannot form any opinion in this case what words have been omitted. It is probable that it was intended to limit the gift to children who should attain twenty-one; but whether or not that was coupled with the contingency of their surviving their mother I have great doubt; and unless I could come to a clear conclusion—if it remain at all doubtful whether it was intended to be a simple contingency of their attaining twenty-one, or with another contingency superadded—I am not at liberty to supply the words suggested; I have no authority to make a will for the testator by adding words, unless there is a necessary implication that the words to be added have been omitted by mistake. I am therefore of opinion, that I cannot supply any words in this case.

1857.
HOPE
v.
POTTER.
Judgment.

Then it remains to be considered, whether, as against the heir of the testator, I can give any meaning to the words of this gift. I agree that it is a strained construction to carry back the word "such" to the children mentioned in the earlier part of the will.

In *Strutt v. Braithwaite* (a) the construction was quite natural. We say, commonly, "if a person has children, I give to such children." In that case, the original limitation was to all and every the child or children, and carrying it

(a) 5 De G. & S. 369.

1857.
 HOPE
 v.
 POTTER.
 —
Judgment.

back to the original words, "such" children must have meant all the children. But here, in the earlier part of the will, there is a gift to *C. T. Driffield*, with an executory devise if she should die without having left any child or children her surviving, and then the limitation of the residue is to "such" children of *C. T. Driffield*.

As against a construction which would lead to an intestacy I hold that there is sufficient indication in the will to shew that children of this daughter were intended to take. The question is, whether it was intended to exclude any from the benefit of the gift. I do not find any words of exclusion; and as I find the children of *Charlotte Theakston Driffield* mentioned in the former part of the will, I think I am justified in reading the word "such" as equivalent to "the said." The direction to pay the rents and profits "in the meantime," is of doubtful meaning; but upon this construction it is not insensible, because the trustees are to convey and assure the property to the children, and "the meantime" may signify the interval which may elapse before such conveyance is made, or, at all events, it may mean during the minority of any of the children.

It is impossible to make any construction of a will like this, which will not be somewhat forced; but I am forcing the construction against the heir and not against any other parties.

As to the argument from the absurdity of supposing that these interests are to vest immediately, and, in the event of none of the children attaining twenty-one, are to be again divested; a similar argument applies with equal force to the construction that the shares of any who attained twenty one would vest, but if the mother afterwards died without leaving any children, such shares would thereupon be divested.

In Spalding v. Spalding(a) and Abbot v. Middleton(b),

(a) Cro. Car. 185.

(b) 1 Jur. N. S. 1126.

the Court struggled to prevent an estate previously given from being destroyed by a contingent limitation over. In this case I am asked to restrict an estate which is limited without restriction, by an inference which it is attempted to raise from the word "such." I am of opinion that I cannot do this; but I must decide that the seven children took vested interests.

1857
 HOPKINS
 v.
 POTTER.
 Judgment.

IN THE MATTER OF THE TRUSTEE RELIEF ACT;
 IN THE MATTER OF THE TRUSTS OF HODGES' SETTLEMENT;

March 14th,
 16th, 17th, &
 18th.

IN THE MATTER OF THE TRUSTS OF COGGAN'S WILL;

IN THE MATTER OF M. C. L. HODGES, AN INFANT;

IN THE MATTER OF THE 18 & 19 VICT. c. 43, THE INFANTS' SETTLEMENTS ACT.

THIS was a petition presented by the guardian of a young lady under age, appointed by her father's will.

Ward of Court
 —Trustee Relief Act—Effect
 of Order on
 Petition.

It appeared, that she was entitled to three funds in Court, under the following circumstances:—

Money belonging absolutely to a young lady under age, having been paid into Court under the Trustee Relief Act, and an order made upon petition under that Act for payment of part of the

The first sum was a legacy by her father's will, vested in her, payable when she should attain twenty-one. The second sum was vested in her under the settlement made on her father's marriage, and was payable to her at twenty-one or marriage, with a power enabling the trustees of the settlement to apply the interest for her maintenance. The

dividends to her testamentary guardian for her maintenance, in pursuance of an order for an allowance for her maintenance made upon an application at Chambers:—Held, that the infant was thereby made a ward of Court.

Succeeded in Pet. 4. 1. Feb. 1859

1857.

In re
HODGE'S
SETTLEMENT.

Statement.

third fund was a legacy given to her by her grandfather's will, and was to be paid at twenty-one, or marriage with the consent of her guardian.

On the 5th of June, 1854, an order was made, on summons, at Chambers, that the first sum should be paid into Court to an account in the matter of *M. C. L. Hodges*, an infant, and that the interest should be paid to her guardian, the petitioner, for her maintenance; and that the trustees of the second sum should be at liberty to pay so much out of the interest of the second sum as would make up the amount of 400*l.* a year.

The first sum was transferred into Court under that order.

The trustees of the second sum then transferred that fund into Court, under the Trustee Relief Act; and, upon petition under that Act, an order was made directing the Accountant-General to pay to her guardian, out of the dividends thereof, such a sum as would make up the yearly amount of the maintenance allowed to the infant.

The third fund was also transferred into Court, under the Trustee Relief Act; and no petition having been presented with regard to it, the dividends had been accumulated.

The young lady had attained the age of eighteen, and a marriage had been agreed upon between her and *A. B.*

This petition was presented by the guardian, stating the above facts, and praying for an inquiry as to the fitness of the marriage—that *A. B.* might lay proposals for a settlement before the Judge at Chambers—that such settlement might be settled at Chambers—that “the sanction of this Honourable Court might, in pursuance of the provisions contained in the Act lastly mentioned in the title hereof,

be given to the said infant *M. C. L. Hodges*, to enable her to make the settlement proposed to be so settled by the said Judge as aforesaid, as valid, binding, and effectual as if the said *M. C. L. Hodges* was of the full age of twenty-one years"—that, on the execution of the settlement, the parties might be at liberty to intermarry; and that, after the marriage, the trust funds might be paid out of Court to the trustees to be appointed by the settlement.

1857.
In re
HODGE'S
SETTLEMENT.
—
Statement.

Mr. *E. R. Turner*, for the petitioner, said, the petition was presented on account of the doubt whether the infant was a ward of Court, and referred to the Trustee Relief Act, sect. 2, and *In re M'Cullochs* (a).

Argument.

Mr. *Howe* appeared for the trustees, and for the executor of the will of the grandfather of the infant.

VICE-CHANCELLOR SIR W. PAGE WOOD said, he would consult the other Judges, and mention it again on Tuesday morning.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

March 16th.
Judgment.

This seems to me to be a case upon which the opinion of the Lord Chancellor should be sought, as to the jurisdiction over wards of this Court. The old authorities appear to throw some light upon the question. In *Ex parte Birchell* (b) there were two infants, one nineteen years of age and the other twelve, and an application was made by petition not in a suit for the appointment of a guardian, and for leave that the elder of the two might marry; and Lord *Hardwicke* said, that there was no occasion for the latter part of the application, which proceeded upon a misapprehension of the

(a) Dru. 276.

(b) 3 Atk. 813.

1857.
 {
In re
 HODGE'S
 SETTLEMENT.
 —
Judgment.

Marriage Act; that, by the Rubrick and the Act of Uniformity, which adopted its very terms, the infant might be married by banns; and that, when a guardian was appointed, this would have no effect: and he made no order on that part of the petition. I always understood that this was the rule. The guardian may give or withhold his consent to the marriage as he chooses. This Court has no jurisdiction in the matter, unless a bill is filed, and the infant is by this means made a ward of Court.

In the case, *In re M'Cullochs* (a), it is assumed by the Judge, that an infant becomes a ward of Court upon the filing of a bill. The marginal note in that case is not very correct. It states that an infant may be made a ward of Court on petition; what was asked was, that an infant should be made a ward of Court, and the order upon the petition seems to have been, that she should be made a ward of Court, and proper steps taken to secure her property. That seems to mean that a bill should be filed for these purposes.

If that was the old law, I have no doubt that the Act for the Relief of Trustees cannot affect the rule in any way. This statute does not purport to confer upon the Court any jurisdiction of the kind. Trustees pay a particular fund into Court under its provisions, and the statute enacts, that such orders as shall seem fit shall be made by this Court in respect of the fund so paid in upon petition without bill, and that such orders "shall have the same authority and effect, and shall be enforced, and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court."

There is nothing in that provision to make any infant,

who may happen to have an interest in that fund, a ward of Court. The effect of filing a bill, is to give the Court jurisdiction over all the property of the infant. It would be a very different question, whether the lady's equity to a settlement would not arise when she is married.

1857.
In re
HODGE'S
SETTLEMENT.
Judgment.

On the same day, Mr. *E. R. Turner* applied to the Lords Justices, mentioning the case referred to before the Vice-Chancellor, and the case of *Ex parte Birchall*, and further referring their Lordships to *In re Bloye's Trust (a)*. The Lords Justices said they would consider the Trustee Relief Act, and mention it the next morning.

Statement.

The Lords Justices said, the matter had better be brought before the Lord Chancellor.

March 17th.

The matter was opened before the Lord Chancellor and the Lords Justices, in a private room at the Privy Council.

March 18th.

Mr. *Turner* explained the nature of the case of *Ex parte Birchell (b)*, from a note taken from the Reg. Book, and said, that, in this case, the amount of the property was above that which made it necessary, under the practice before 1852, that

(a) 1 Mac. & G. 488.

(b) 3 Atk. 813. Reg. Book, 1753°. A. 471.

The following additional facts are taken from that book. The name of the second infant was *Hester*, not *Mary*. The petition was presented by the two infants, *John Crouther* and *John Birchall*, and shewed that *J. Crouther* had paid his addresses to *Sarah*; that *P. B.*, the father of *Sarah* and *Hester*, was lately dead; that the mother of the infants had lately intermarried

with one *Wood*, and was since dead; that the petitioners considered him a very improper person to have the care and management of the person and effects of the petitioners *Sarah* and *Hester*; that the petitioner *John Birchall* was uncle to the petitioners *Sarah* and *Hester*, and had been applied to by the petitioners *Sarah Birchall* and *John Crouther* for his consent that they should intermarry together; that the petitioner *John Birchall* was willing that the said intend-

* Sic, the Book for 1754 begins Nov. 6.

1857.
 In re
 HODGE'S
 SETTLEMENT.
 —
 Statement.

a bill should be filed, and submitted, that the cases *Ex parte Molesworth* (a) and *Ex parte Lakin* (b) must be considered to have overruled the case of *Ex parte Myerscough* (c); and that the rule established, after a conference with Lord Eldon, as mentioned in *Ex parte Molesworth* (a), could not be rescinded by the single decision of a Vice-Chancellor, in *Ex parte Starkie* (d); and that the summons in Chambers was, on that account, equivalent to a bill filed. He then submitted, that, even were that not so, the custody of the infant's property, and the order for maintenance out of the funds in Court, drew after it the care and custody of the person of the infant, referring to *Wright v. Naylor* (e) and *Wellesley v. Duke of Beaufort* (f). The Trustee Relief Act, however, put the question beyond all doubt, as it was a narrow view to say that an order made should not have the effect of making an infant a ward of Court; because the asking for that order in a suit regularly instituted in the Court, without the actual order itself in the suit, had that effect; and the object and effect of that Act, as explained by Lord Cottenham in *Ex parte Bloye's Trust* (g), was to put the petitioners in the same position as if a bill had been filed, and the suit had come on for further directions after a payment into Court by the executors or trustees. With

ed marriage should take effect, believing the same to be a proper marriage; that the fortune and business of *John Crowther* was equal to the fortune of *Sarah Birchall*; and the petitioners therefore prayed, that the petitioner *John Birchall* might be appointed guardian to the petitioners *Sarah* and *Hester Birchall*; and that the petitioner *John Crowther* might be at liberty to marry the petitioner *Sarah*. All parties were ordered to attend, and on their attending, and on

hearing the petition read, and counsel of all parties: It was ordered, that the petitioner *John Birchall* be appointed guardian of the person and estates of the said petitioners *Sarah Birchall* and *Hester Birchall*, the infants.

(a) 4 Russ. 308, n.

(b) 4 Russ. 307.

(c) 1 J. & W. 151.

(d) 3 Sim. 339.

(e) 5 Madd. 77.

(f) 2 Russ. 1, 18, 20, 21.

(g) 1 M'N. & G. 488.

regard to legacies paid in under the Legacy Duty Act, he said, that though infants did not become wards of Court by that payment, that was inapplicable to the present case, as the words of that Act were, that application should be made to the Court by "petition or motion in a summary way," without any reference to a suit regularly instituted; and the jurisdiction, being a statutory jurisdiction, did not draw after it the ordinary jurisdiction of the Court.

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 {
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The LORD CHANCELLOR, after conferring with the Lords Justices, said, that without expressing any opinion as to any question except that arising on the Trustee Relief Act, he was of opinion, that the effect of that Act was to put the parties in the position pointed out in the case of *In re Bloye's Trust*, and insisted on in the argument; and that he was of opinion that Miss *Hodges* was a ward of the Court.

Mr. *Turner* appearing for the petitioner, and

March 19th.

Mr. *Howe* consenting as before,

The VICE-CHANCELLOR granted the prayer of the petition, except that part praying for the transfer of the funds, which stood over.

1857.

March 14th &
16th.

*Landlord and
Tenant—Es-
toppel—Rem-
edies.*

The doctrine of estoppel between landlord and tenant is founded upon the principle, that a lessee, having accepted a lease, may not plead to the action of his lessor *nil habuit in tenementis*.

But the lessee may plead to such an action, that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose.

Therefore, if a termor affect to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the person to whom he made such assignment; and, accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent. The Statute 4 G. 4, c. 28, does not give power to distrain for such a rent.

LANGFORD v. SELMES.

THIS was an application by a purchaser under a decree of the Court, to be discharged from his purchase, on the ground of a defect in title and a misdescription in the particulars of sale.

By a deed, dated the 22nd of September, 1823, *W. Cooper* demised two houses, Nos. 3 and 4, *St. George's-road*, to *B. C. Langford* and *J. Langford*, for ninety-nine years, from the 24th of June, 1823, with a power to them to purchase the fee simple within twenty years.

By a deed of the 24th of March, 1833, containing no recitals, *B. C. Langford* and *J. Langford* demised the premises to *T. Fowle* from the 25th of March, 1833, for eighty-nine years and three quarters minus ten days, at a rent of 6*l.*, so that this term, in fact, exceeded the residue of the original term of ninety-nine years by six months less ten days.

B. C. Langford devised and bequeathed all his real and personal estate to *J. Langford*; and, subsequently to the death of *B. C. Langford*, *J. Langford* acquired the fee simple in the demised premises by purchase, under the covenant in the original lease, and the tenant continued to pay the rent up to the present time.

The devisees of *J. Langford* now sold the property, under the order of the Court made in a suit to administer his estate, and described it in the particulars of sale as "a freehold ground rent of 6*l.* per annum issuing out of two private dwellings, Nos. 3 and 4, *St. George's-road*, let on

lease, which will expire on the 14th day of December, 1922."

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Statement.

The purchaser objected to complete, on the ground that a right of distress could not be given to him, and that the rent was not a freehold rent—and, accordingly, he applied to be discharged from his purchase.

Mr. W. M. James, Q. C., and Mr. Kingdom, for the purchaser:—

Argument.

The deed of the 24th of March, 1833, operated as an assignment of the whole interest of the original lessees, and therefore the rent reserved is not incident to any reversion, and there is no power of distress: *Parmenter v. Webber* (a), *Thorn v. Woolcombe* (b). In *Pollock v. Stacy* (c), where it is said that the relationship of landlord and tenant continues, it is admitted that the right of distress is gone.

If the purchaser were obliged to take the premises, he could not sue on the covenants contained in the underlease in his own name, but would have to sue in the name of the lessor or his representatives. See 2 Saunders, by *Williams*, 418 c; *Pluck v. Digges* (d).

It will be argued, that there is a reversion by estoppel.

But, though a tenant cannot dispute his landlord's title, he can confess and avoid it.

Moreover, there is no estoppel; for, according to Lord Coke (e), "whensoever any interest passeth from the party there can be no estoppel against him;" and again, Co. Litt.

(a) 8 Taunt. 593.

(d) 5 Bligh, 31.

(b) 3 B. & Ad. 586.

(e) Co. Litt. 45. a.

(c) 9 Q. B. 1036.

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47. b., "A., lessee for the life of B., makes a lease for years by deed indented, and after purchases the reversion in fee; B. died, A. shall avoid his own lease."

In *Hicks v. Downing* (a) it was resolved, that, "if lessee for three years assigns his term for four years, or demises the house for four years, he does not by this gain a tortious reversion, and it does but amount to an assignment of his interest."

During the interval which elapsed before the *reversion was acquired*, the so-called underlease must have operated as an assignment; and it was impossible afterwards to give a new and contrary effect to it: at least the title was too doubtful to force on a purchaser.

There is no right of distress, he cannot take the benefit of the condition for re-entry—as stat. 32 Hen. 8, c. 34, only applies where there is a reversion—covenants will not run with a rent (b), the incidents of an assignment and underlease are altogether different.

Mr. *Shapter*, for the vendors:—

First, the deed of 1833 was a lease: Serjt. *Manning's* note to *King v. Wilson* (c), *Poultney v. Holmes* (d), *Pollock v. Stacy* (e).

Secondly, it was a good lease by estoppel, conferring on the lessor by estoppel a reversion and a right of distress directly he acquired the freehold interest. The passages cited from Co. Litt. only shew, that, where the *whole* estate can take effect out of interest, there is no estoppel. The instances given by *Coke* prove his meaning. There are

(a) 1 Ld. Raym. 99.

(b) *Milnes v. Branch*, 5 M. & S. 417, was mentioned.

(c) 5 M. & Ry. 156.

(d) 1 Strange, 405.

(e) 9 Q. B. 1033.

cases of tenant for life or pour autre vie making grants or leases for years, which possibly could and were reasonably expected to take effect wholly out of the interest possessed by the grantor. It was matter of contract that the assurances should so take effect, or, if not expressly declared to be the contract, the law presumes that the parties intended to do what might lawfully and regularly be done. That is the rule laid down by *Coke* himself, at Co. Litt. 42. a. b. But how can it be supposed the parties contemplated that a termor (with a right too to purchase the fee) intended that a lease exceeding his term should take effect wholly out of his term?

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At p. 367. a., *Coke* on Litt. puts the case of a lessee for years or tenant by elegit making a feoffment in fee, and adds, "a feoffment de facto made by them that have such interest or possession as is aforesaid, is good between the parties, and against all men, but [i. e. except] only against him that hath right;" and *Littleton*, 667th section, states the case of a husband, who had an interest in right of his wife, being estopped by his conveyance of the fee.

Patteson, J., in *Doe v. Barton* (a), correctly states the rule thus:—"A deed, which can take effect by interest, shall not be construed to take effect by estoppel."

In *Gilman v. Hoare* (b) it is expressly declared, that a lease may take effect partly out of estate and interest, and partly by estoppel. In that case, and in *Sturgeon v. Wingfield* (c), reversions on leases were created by estoppel: *Weale v. Lower* (d), *Vick v. Edwards* (e), *Doe v. Oliver* (f), *Cole v. Sewell* (g), *Bensley v. Burdon* (h), *Webb v. Austin* (i), are all cases of estoppel where some interest passed.

(a) 11 Ad. & E. 311.

(b) 1 Salk. 275.

(c) 15 M. & W. 224.

(d) 1 Pollexf. 54.

(e) 3 P. Wms. 372.

(f) 10 B. & C. 181.

(g) 2 H. L. Cas. 186.

(h) 2 S. & S. 519.

(i) 7 M. & G. 701.

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Argument.

In this case, there is no recital of title or other matter on the face of the deed to prevent estoppel.

It is admitted, according to the resolution in *Hicks v. Downing* (a), that a *tortious* reversion is not gained by a lessee demising or assigning his whole term, or beyond it. But that has no bearing on the question, whether, if the grantor acquire a further interest, there is not a reversion by estoppel.

The setting up a case of estoppel admits the clear doctrine that a tenant may confess and avoid, and so shew the determination of his landlord's title. The question is, whether he is under the circumstances *estopped* from so doing. If a tenant for life or pour autre vie make a lease for years, and die, the tenant may shew the facts from which it is to be inferred, that, as the lease could wholly take effect out of interest, it was intended and did so, and so shew the determination of the term. But if a lessee for ten years, assuming to be owner of the fee, grant a lease for twenty years, and then acquire the fee, surely he is bound to give effect to his contract—at law as well as in equity. He is *estopped*—estoppels are mutual—and his lessee is also *estopped* from denying his landlord's title to grant a lease for twenty years.

The tenant, in this case, has gone on paying rent after his landlord acquired the fee, and has paid rent up to the present time. Neither party is in a situation to dispute the title of the other.

Thirdly, it is admitted by the vendors, that the case is not within the 9th section of the stat. 8 & 9 Vict. c. 46, for that preserves the remedies against the tenant, only when the immediate reversion is lost by *merger*.

(a) 1 Ld. Rayn. 99.

But it is submitted, that the acquisition of the fee may be deemed a renewal of the lease within the 5th section of the stat. 4 Geo. 2, c. 28.

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Argument.

If the rent be a rent-seck, the 6th section of the stat. 4 Geo. 4, c. 28, gives a right of distress.

If it be a rent-service, the tenant cannot object to pay it, and must submit to distress, for, by the stat. 11 Geo. 2, c. 19, s. 22, it is not necessary for a landlord to plead his title.

Mr. W. M. James, Q. C., in reply:—

Most of the cases cited are cases of feoffments or fines, which were tortious conveyances, having a peculiar effect in creating estoppel, which innocent assurances have not.

Gilman v. Hoare (a) is differently reported by the name of *Holman v. Hore* (b), and there it appears that estoppel depended on no interest passing.

The principle which prevents a tenant from denying his landlord's title is, he cannot plead that his landlord "nil habuit in tenementis;" but if he acknowledges a title and interest, however small, he can deny the rest.

The VICE-CHANCELLOR reserved judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

There is no doubt, that, from the description of the property given in the particulars of sale, the purchaser was justified in believing that he was buying a freehold ground rent, with all the remedies of the reversioner. The only

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(a) 1 Salk. 275.

(b) 3 Id. 152.

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question, therefore, is, whether, under the circumstances of the title, he would, upon the completion of his purchase, acquire such remedies.

It appears, that the vendor's testator, being possessed of a lease for the residue of a term of ninety-nine years, with the option of purchasing the fee simple in reversion, granted a lease for a term which exceeded the residue of his own term.

One point arising in this case is free from doubt. It was conceded, that, if a termor, or the owner of any estate in land, which might possibly be sufficient to allow an interest created by his deed to take effect out of such estate, make a deed purporting to grant such interest, which in the event fails to some extent, from the circumstance of the grantor's own estate not being of sufficient duration to enable the grantee to take all that the deed purported to give him,—as in the illustration given in *Co. Litt.*, if a tenant for life were to demise for a term, and then to die during the term—an actual interest will pass by the grant, and the grantee will not be estopped from shewing the determination of such interest, as by the death of the grantor during the term—that is to say, admitting that the lease was for a term of so many years, he would be at liberty to prove that the lessor had only a life interest; and that, accordingly, by his death, the lease had determined: for, though it is an admitted principle, that a lessee cannot dispute the title of his landlord, it is equally clear, that, where he can confess and avoid it by shewing that the landlord's estate has determined, he is permitted to do so, and thus to prove that the lease exists no longer.

In truth, the question in this case is, whether or not there is any reversion on which the purchaser of the ground rent would have a right to proceed for its recovery by distress or

re-entry. As respects the reversion, the case is in a singular position. Unquestionably, a termor who grants a lease longer than his term, thereby parts with his whole interest; and, during the term of the original lease, the tenant would hold of the owner in fee simple who had granted the original lease; but the argument is, that, on the subsequent acquisition of the fee simple by the original lessee, an estoppel arose, by which, on the expiration of the original lease, the supposed underlessee will hold of the underlessor who had affected to demise to him, at a rent of 6*l.*, for a term greater than he was possessed of at the date of the underlease. There is no authority for such a proposition; and the only argument in favour of it has been, that, although there is not a complete estoppel where there is an interest which might be sufficient to effect the whole object of the deed, yet where the interest was *ab initio* insufficient, there, in order that the deed may not lose its effect, the parties are estopped from saying that the actual interest which it purported to grant has not passed. The only authority which has been cited is *Gilman v. Hoare*, which was of a different character. That was a case where a person having a reversionary interest made a grant, and it was supposed, from the report in 1 Salkeld, that an interest there passed by way of estoppel during the first period, and out of the estate during the latter period of the demise. It appears, however, from another report of the same case, 3 Salkeld, (and it is impossible therefore to treat it as an authority), that there was no interest at all, because there had been no attornment in respect of the original interest of the lessor which he purported to grant, and therefore, the lessor having no interest, the rule applied that a lessee cannot say that his lessor had no interest at the time of making the lease, and, accordingly, there was a perfect estoppel as between the lessor and the lessee; and therefore there was no difficulty in that case, because the true reason of the rule is, that a lessee, having accepted a lease, cannot

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plead to an action by his lessor, that the lessor nil habuit in tenementis. That is the principle of estoppel; but I never heard it doubted, that, when a person has granted a lease exceeding in duration the actual term which he held, the effect of that would be a demise of the whole term, so that the grantee would hold of the grantor of the original term, out of which the underlease was intended to be made. There is a note by the learned editor to the case of *King v. Wilson* (a), in which he considers the question, whether or not, as terms of years are not within the statute of quia emptores, there might not be tenure where there had been a demise of the whole term by way of underlease, and, although there would be no substantial reversion, whether there would not be the relation of landlord and tenant created, and whether the rights of the landlord might not be said to exist. He suggests, indeed, a doubt whether the law of tenure was ever held to have effect on such interests as terms of years.

At the time of that statute, it would have caused much astonishment, if it had been suggested, that it was necessary to include terms of years therein, or that a mere termor could create a tenure between himself and his grantee by the grant of the term of years; he might by feoffment have acquired a tortious fee, and then a tenure might be created; but it never before was suggested, that there could be any tenure between a lessee for years and a person to whom he granted the whole of his term. The reason that a termor is a reversioner, where he has sublet for a part only of his term, is, that he has the interest of the reversioner, that is of the freeholder, still in him during the rest of his term.

The case cited and controverted by Serjt. *Manning* is a plain decision on another point, which was raised in argu-

(a) 5 Man. & Ry. 140.

ment, namely, on the effect of the stat 4 Geo. 4, c. 28, giving power to distrain for a rent-seck. It is an *Anonymous case* (a), arising on a replevin, and the question was, what right of distress existed where the whole of the term had been granted reserving a rent; and the Court gave judgment for the Plaintiff without hearing his counsel, and said, "There are two ways of creating a rent, the owner of the lands either grants a rent out of it, or grants the lands and reserves a rent; there is no such thing as a rent-seck, rent-service, or rent-charge issuing out of a term of years."

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That seems to meet the question of the application of the statute.

In this state of the law, there is nothing to support the view which has been contended for, that, where a deed cannot operate to its full effect, it shall do so by way of estoppel, the true ground of estoppel being a different one, namely, that a tenant may not dispute the right of his landlord, by saying that he had nothing in the property. It is equally clear that he may, nevertheless, shew that the landlord had an interest at the date of the lease, which has since determined; and although there is no precise authority deciding this point, as the whole current of cases seems to be adverse to the argument of the vendor, it is impossible for me to hold that the purchaser is compelled to buy these ground rents, with such grave doubts as to the remedies which he may have for recovering them.

(a) ——— v. *Cooper*, 2 Wils. 375.

1857.

March 2nd,
3rd, & 6th.

BECK v. KANTOROWICZ

KANTOROWICZ v. CARTER.

KALB v. KANTOROWICZ

*Fraud—Trust
and Trustee—
Principal and
Agent.*

Four out of five persons, who entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a company, were deceived by the fifth, who, assuring them that the vendors would not take less than 85,714*l.*, obtained secretly from the latter an agreement, that, if the contract were perfected, and money paid, he should receive thereout a bonus of 20,000*l.* for his pains in effecting the sale.

EARLY in the year 1853, the Defendant *Kantorowicz* entered into a negotiation with the Defendants *Carter, Moriarty, Twynham, and Werninck*, with a view to a purchase by himself and them of the mining *Concession* "*Wildberg*," in *Germany*, then the property of the widows *Hunsdiecker* and *Merttens* and *Leopold Hunsdiecker*, for which, he represented to his Co-defendants that the proprietors would not consent to take less than 1,000,000 florins *Rhenish* (85,714*l.*).

By a contract in *German*, dated the 15th of June, 1853, and made between the widows *Hunsdiecker* and *Merttens* and *Leopold Hunsdiecker* of the one part, and the Defendants *Carter, Moriarty, Twynnam, Werninck, and Kantorowicz* of the other part, reciting, that the parties of the first part were sole, exclusive, and irrevocable proprietors of the *Concession*; that the parties of the second part wished to purchase the *Concession*, should the same after examination answer their expectations—such purchase to be for a society or company, which they intended to form among themselves or with other parties, or exclusively for other

Two of the four, having absolute powers from the rest to sell to the intended company, then formed themselves with others into a committee of management, and, still ignorant of the surreptitious agreement, issued a prospectus, stating, that a contract had been entered into for the purchase by the company of the entire property for 125,000*l.*, "including all preliminary expenses, and a premium to the parties who incurred the risk and responsibility of the original purchase." The company having been established, the requisite capital paid up, and the provisional contract perfected:—*Held*, that the 20,000*l.* transaction was fraudulent, and void, not only as against the four original purchasers, but also as against the company, notwithstanding the mine proved cheap at the price (125,000*l.*), at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly and rightly, to give them.

parties; and that the parties of the first part were willing to transfer their property for 1,000,000 florins *Rhenish*:—In order to give the parties of the second part liberty to become acquainted with the peculiarities of the mine, and in order to form the company in whose interest they intended to purchase, but, at the same time, in order to indemnify the parties of the first part in the event of the noncompletion of the contract, it was stipulated (*inter alia*), 1st, that the parties of the second part having paid to the parties of the first part 100,000 dollars (15,000*l.*), in consideration of that payment, the right was thereby conceded to the parties of the second part to purchase the said *Concession* as their property and for ever, within six months from that day, by simple declaration of acceptance before the notary drawing up that instrument, either on their own behalf, or on behalf of that person or society which they might name, for 1,000,000 florins *Rhenish*, (571,428 dollars); 2ndly, that, if any acceptance should take place within the six months, the 100,000 dollars should become the irrevocable property of the sellers, and serve as first instalment of the purchase money, the remaining 471,428 dollars to be paid on or before the 15th of January, 1854; of which payment the purchasers should have the right to hand over 143,000 dollars in paid up shares, at the nominal value of the company purchasing the mine, should such company be formed; 3rdly, that, from the day of acceptance, the purchasers should enter upon the real possession of the object of sale, in such manner as if they had possessed and used the same from that date; 4thly, that, up to such time of acceptance, the parties of the first part should remain in possession, work the mines, and hold the clear produce, in trust, for the eventual proprietor; and, 5thly, that, if the declaration of acceptance should not have been made within the six months, the parties of the first part should be authorised, without previous summons, and by the mere expiration of the term, to dispose of their property,

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and should acquire out of the 100,000 dollars the amount of 50,000 dollars as indemnity for the noncompletion of the negotiation, the remaining 50,000 dollars to be paid to the account of the Defendant *Carter*.

On the same 15th of June, 1853, and previously to the execution of the last-mentioned contract, an indenture of even date was executed by *Carter*, of the first part; *Twynam*, of the second part; *Moriarty*, of the third part; *Kantorowicz*, of the fourth part; *Werninck*, of the fifth part; and the Defendant *Harris*, of the sixth part, in reference to the deposit of the 100,000 dollars (15,000*l.*); whereby, after reciting that the parties of the first five parts had agreed to purchase the premises, and the conditions for the payment of the deposit of 15,000*l.*, and for the forfeiture of a moiety of that sum by the last-mentioned parties in the event of their not completing the purchase; and reciting, that the deposit had been contributed in the proportions following, viz. *Carter*, 3,000*l.*; *Twynam*, 6,000*l.*; the Plaintiff *Beck*, 3,000*l.*; and a Mr. *Vallance*, 3,000*l.*; making together the sum of 15,000*l.*; and further reciting the contract of purchase of even date then about to be executed, it was agreed, that, in the event of the contract not being carried out, the forfeiture of a moiety of the deposit should be borne equally by the parties of the first five parts; and the same indenture contained a covenant by *Harris*, in the event of *Kantorowicz* or *Werninck* failing to perform their part of the agreement, to pay to the parties of the first three parts such sums as might be found to be the proportions payable by *Kantorowicz* and *Werninck*, or either of them, in respect of the forfeiture.

By a letter of the same 15th of June—and by an indenture of the 20th of July following, *Kantorowicz* and *Werninck* agreed to pay to *Harris* 1,000*l.* and interest; and that their one-fifth shares in the mine, or in the beneficial

interest in the contract, should be charged with payment of that sum, and also by way of indemnity to *Harris* in respect of his having entered into the guarantee on behalf of *Kantorowicz* and *Werninck*.

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On the same 15th of June, 1853, after the execution of the contract and indenture of that date, articles of agreement or partnership of even date were made between *Carter*, of the first part; *Twynam*, of the second part; *Moriarty*, of the third part; *Kantorowicz*, of the fourth part; and *Werninck*, of the fifth part; whereby, after reciting the contract for purchase, it was declared and agreed, 1st, that the contract for purchase had been entered into by the said parties thereto for their mutual benefit, and that they were and should be jointly interested in the profit or loss arising therefrom, in equal shares and proportions; 2ndly, that the said contract had been entered into on the distinct understanding and agreement, that any three of the parties thereto, of whom the Defendants *Carter* or *Twynam* should be one, should have full and absolute power and authority to negotiate and deal with the said mine and property in as full and ample a manner, to all intents and purposes, as if all the parties thereto joined and concurred personally in any act so to be done by any three of the said parties, provided that either *Carter* or *Twynam* should be one of such three parties; and, 3rdly, each of the said parties thereto expressly and fully authorised and empowered any three of the others, of whom *Carter* or *Twynam* should be one, to take all necessary steps, and to do and enter into any act, deed, matter, agreement, or arrangement respecting such contract of purchase and the property comprised therein, and to do all and every act and acts in reference to the completion or noncompletion of the said purchase, and relating or incidental thereto, as any three of the said parties thereto, of whom *Carter* or *Twynam* should be one, should in their full and absolute discretion think right.

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After the execution of the several documents of the 15th of June, 1853, the mine was examined; and, the result proving satisfactory, it was determined to complete the purchase, and to form a company.

Accordingly, in November, 1853, a prospectus was issued, intitled "The Prospectus of the *Wildberg* Great Consolidated Mining Company, to be conducted (until a royal charter for a *Société Anonyme* be obtained) under the *Prussian* mining law." And stating, in large letters at the top, that the capital of the company was 1,000,000 dollars, or 150,000*l.*, in 75,000 shares of 2*l.* each. It then stated, that the committee of management consisted of five persons, viz. the Defendants *Carter* and *Twynam*, and the Plaintiffs *Beck*, *Morris*, and *Underwood*; and that the company was established for the purpose of working the mine at *Wildberg*. Then, after describing the value of the mine as tested by a recent careful investigation, the prospectus contained the following passage:—"A contract has been entered into for the purchase by the company of the entire property, for the sum of 125,000*l.*, including all preliminary expenses, and a premium to the parties who incurred the risk and responsibility of the original purchase. To this sum 25,000*l.* have been added for working capital. It is believed, however, that 15,000*l.* will be amply sufficient for that purpose; and the remaining 10,000*l.* will be reserved, and only raised if a larger expenditure in machinery, &c., than is now contemplated should hereafter be found expedient, with a view to increased profit from the mines; and, in that case, the shares will either be issued to the existing shareholders, or sold for the benefit of the company. The purchase includes also the whole of the ores raised since the 15th of June, 1853. The vendors have agreed to receive the purchase money as follows, viz. 55,000*l.* in cash, and 70,000*l.* in paid up shares, 50,000*l.* of which shares will not be transferable until after the expiration of six months from the day of

allotment." The prospectus concluded with a description of the character of the mine, and setting forth numerous reports representing it as a very valuable and profitable investment.

The company was established by a notarial act, on the 13th December, 1853; the requisite shares were allotted, and the requisite capital was paid up.

A declaration of acceptance of the original purchase was given on the 13th of December, 1853; and, on the 15th of January, 1854, the balance of the purchase money was paid to the original proprietors, as to part in cash, and as to the remainder by a promesse d'actions (share certificate) for 10,725 paid up shares in the company, of the nominal value of 143,000 dollars (21,450*l.*).

Shortly afterwards it was discovered, that, under a contract made on the 20th of January, 1854, between the widows *Hunsdiecker* and *Merttens* and *Leopold Hunsdiecker*, and the Defendant *Kantorowicz*, the promesse d'actions had been notarially deposited with a notary at *Cologne*, to be held in trust, as to 665 only of the shares, for the widows *Hunsdiecker* and *Merttens* and *Leopold Hunsdiecker*; and, as to the remaining 10,060 shares, of the value of 134,134 dollars, or upwards of 20,000*l.*, in trust for *Kantorowicz*, with a declaration that the parties were interested in the promesse d'actions in the above proportions. In this contract of the 20th of January, 1854, reference was made to a contract made on the 7th and 23rd of October, 1853, between the attorneys of the widows *Hunsdiecker* and *Merttens* and *Leopold Hunsdiecker*, on the one part, and *Kantorowicz*, on the other part, whereby, "in consideration of the great pains which *Kantorowicz* had taken to bring the business" (meaning the contract for pur-

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chase of the 15th of June, 1853,) "to a favourable issue," the said attorneys bound themselves in the names of their principals, in case the purchase contemplated by Messrs. *Carter* and others should be completed, and the purchase money paid within the time limited, to pay *Kantorowicz* that portion of the purchase money which should exceed 425,000 thalers, deducting, however, out of such portion, interest from the 15th of June at 5l. per cent., and all expenses incurred by the proprietors, with power for the proprietors, in case a portion of the purchase money should be paid in shares of such a company as Messrs. *Carter* and others contemplated establishing, to transfer the same amount of shares at their nominal value to *Kantorowicz*, in payment of the amount to be received by him. And the contract contained a proviso, that, in case Messrs. *Carter* and others should fail to make the declaration of acceptance within the time limited, or to pay the purchase money at the stipulated period, *Kantorowicz* should have no claim whatever for his trouble.

On discovering what had passed between *Kantorowicz* and the former proprietors, the Defendants *Carter*, *Twynam*, *Moriarty*, and *Werninck* at once repudiated the transaction; and they and the Plaintiffs instituted a suit in *Prussia* against *Kantorowicz*, to recover the promesse d'actions. A cross-action, for the like purpose, was also commenced in the same Courts by the Defendant *Kalb*, to whom *Kantorowicz*, for valuable consideration, had assigned his interest in the promesse d'actions.

Under these circumstances, the Defendants *Carter* and *Twynam*, as members of the committee of management, retained in their hands a sum of 802l. 3s. 9d., and the certificates for 2,425 shares, which together represented the fifth part to which *Kantorowicz* was entitled in the premium then payable to the five Defendants, for the purpose

of reimbursing themselves and the Plaintiffs the costs and damages sustained by them in respect of the proceedings in the *Prussian Courts*.

In November, 1854, *Kantorowicz*, for valuable consideration, assigned the 2,425 shares, and the 802*l.* 3*s.* 9*d.*, to *Harris*, in trust (subject to the indenture of the 20th of July, 1853,) for the Defendant *Kalb*.

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The Plaintiffs *Beck*, *Morris*, and *Underwood*, as three of the committee of management of the company, now filed their bill on behalf of themselves and all other the shareholders of the company, except such of the Defendants as were shareholders, against *Kantorowicz*, *Carter*, *Twynam*, *Harris*, *Moriarty*, *Werninck*, and *Kalb*, praying, 1st, that it might be declared, that the appropriation for the benefit of *Kantorowicz* of the promesse d'actions was, to the extent at least of 10,060 shares, part of the 10,725 shares therein comprised, a fraud upon the Plaintiffs and the other shareholders in the company; and that *Kantorowicz* was answerable for, and that he might be decreed to make good to the Plaintiffs and the Defendants *Carter* and *Twynam*, as the committee of management of the company, on behalf of themselves and the other shareholders in the company, the said 10,060 shares; 2ndly, that the certificates of the 2,425 shares, and the 802*l.* 3*s.* 9*d.* retained by *Carter* and *Twynam*, might be applied in discharge of the aforesaid liability of *Kantorowicz*, and of the value of the 10,060 shares, and towards reimbursing the Plaintiffs and the Defendants *Carter* and *Twynam* the costs incurred by them in the *Prussian Courts*; and also all costs and expenses incurred by them in this suit, and in the two suits of *Kantorowicz v. Carter* and *Kalb v. Kantorowicz*, which had been instituted respectively in August, 1854, and May, 1855, in this Court, to recover the certificates for the 2,425 shares, and

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the 802*l.* 3*s.* 9*d.* retained by the Defendants *Carter* and *Twynam*.

It appeared by the evidence, that, throughout the negotiation with the original proprietors for the purchase of the *Concession*, and until after the declaration of complete acceptance, the Defendants *Carter*, *Moriarty*, *Twynam*, and *Werninck* looked upon *Kantorowicz* as a joint purchaser with themselves; and that, both before and after the contract of June, 1853, they availed themselves of his knowledge and information—he being better informed than themselves as to the value of the property,—and pressed him to get better terms than those proposed (1,000,000 florins); that he repeatedly stated, that the vendors would not sell for less than that price, that it was in vain to ask them; and that it was desirable for them to complete the purchase, because there was a *French* party in the field, who was desirous of making the purchase if they did not. These representations were repeated by *Kantorowicz* in October, 1853.

The Court was also satisfied, upon the evidence, that, in fixing 125,000*l.* as the price to be paid by the company for the *Concession*, the committee of management believed they were to pay the whole 1,000,000 florins (85,714*l.*) to the original proprietors; and intended to provide, and believed they were providing, a sum not exceeding 30,000*l.*, as the premium to be paid to the parties who incurred the risk and responsibility of the original purchase.

Argument.

Mr. *Rolt*, Q. C., Mr. *Daniel*, Q. C., and Mr. *Beales*, for the Plaintiffs, contended, that the surreptitious contract entered into by *Kantorowicz* with the original proprietors of the mine, and the appropriation by that Defendant of the promesse d'actions, was a fraud not only upon the Defendants

Carter, Moriarty, Twynam, and Werninck, who had joined with him in the purchase in the belief that he had a common interest with them in obtaining the property as cheaply as possible, but also upon the company at large, who, through their agents, *Carter and Twynam*, had been equally defrauded, and compelled to pay for the mines a sum exceeding, by more than 20,000*l.*, the price which the latter, as members of the committee of management, would otherwise have fixed for the purchase of the mine, including the preliminary expenses and the premium mentioned in the prospectus.

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Upon the first point, they cited *Hichens v. Congreve* (a), and *Fawcett v. Whitehouse* (b).

Mr. *Locock Webb*, for the Defendants *Carter, Twynam, and Moriarty*; and Mr. *E. C. Clarkson*, for the Defendant *Werninck*, waived their claim to the shares in question in favour of the company.

Mr. *Willcock*, Q. C., and Mr. *Elderton*, for the Defendants *Kantorowicz* and *Kalb*, contended, that, in the original negotiation for the purchase of the mine *Kantorowicz* was a seller, not a buyer. *Hichens v. Congreve* was the clearest case of fraud imaginable. There, the parties were in a fiduciary relation; and *Foss v. Harbottle* (c) shewed that this, in Vice-Chancellor *Wigram's* view, was the ground of that decision. Here, there was nothing fiduciary in the case. It was not as their agent that his co-defendants put confidence in *Kantorowicz*.

THE VICE-CHANCELLOR.—If you can shew that *Kantorowicz* had an interest in the mine, and came to sell that interest, of course the question is at an end. But the contract of June, 1853, under which he and his co-Defendants

(a) 1 Russ. & My. 150.

(b) Id. 132.

(c) 2 Hare, 461.

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claim the property, describes the *Hunsdieckers* and the widow *Merttens* as "the sole, exclusive, and irrevocable proprietors."

Mr. Willcock, Q. C.—But, admitting that the transaction cannot be maintained as against those who joined with *Kantorowicz* in that contract, it may still be valid as against the company. The Defendants were not *contractors* for the company, but *vendors* to it. By their prospectus, they held out to the company that they might purchase, for 125,000*l.*, a mine, which has proved to be fully of that value. Every one, who, after reading that prospectus, became a shareholder, purchased at that price. The mine can be worked at that price; nothing is said in the prospectus as to the amount of the premium; and all that the Plaintiffs complain of is simply this, that they have had to pay what they all agreed to pay, for that which is well worth the money.

Mr. Cairns, Q. C., and Mr. Toulmin, for the Defendant *Harris*, were not called on: the Vice-Chancellor deciding, that, inasmuch as the letter and indenture, under which that Defendant claimed a lien, were anterior to the delivery of the promesse d'actions and any right that accrued from it, the Court could not deprive him of the benefit of such letter and indenture.

Mr. Daniel, Q. C., by the direction of the Court, confined his reply to the question as between *Kantorowicz* and the company: the VICE-CHANCELLOR being clear, that, as between that Defendant and his co-purchasers, the transaction could not be maintained.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is, whether the company, represented by the Plaintiffs, is entitled as against the Defendant *Kantorowicz*,—or rather as against the Defendant *Kalb*, as the assignee of a promesse d'actions given in *Prussia*,—to have such promesse d'actions considered void as against the company, and to a lien upon certain other shares, and a sum of money, which two of the managing body of the company, the Defendants *Carter* and *Twynam*, retained in their hands, and which would belong to *Kantorowicz*, if the transaction as to the promesse d'actions could be maintained; the Plaintiffs contending, that, if it cannot be maintained as against the company, they are entitled to a lien on such last-mentioned shares, in respect of any damage they may sustain in consequence of the promesse d'actions having been given through the fraud (as they allege) of *Kantorowicz*, and in respect of any demand that may be made in respect of shares under the promesse d'actions. They also ask for an indemnity against the costs of certain proceedings in *Prussia* in respect to those shares.

The transaction, as between *Kantorowicz* and his four co-Defendants *Carter*, *Twynam*, *Moriarty*, and *Werninck*, is free from all question or difficulty. Whatever may have been the position of those parties previously to the contract for the purchase of the mine, their position at the time of the contract is clearly indicated by the deed of June, 1853, wholly independent of any other evidence in the cause. That deed is very precise in its terms. It is between the *Hunsdieckers* and the widow *Merttens*, of the first part; and the Defendants *Carter*, *Moriarty*, *Twynam*, *Werninck*, and *Kantorowicz*, of the second part. The vendors are put in direct opposition to the vendees. *Kantorowicz* is not among the vendors, but is among the vendees. There is not the slightest notice of any interest of his in the property.

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1857.
 BROOK
 v.
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 KANTOROWICZ
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 KALB
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 —
Judgment.

On the contrary, there is that which excludes him from any interest in the property, namely, a distinct recital that the *Hunsdieckers* and the widow *Merttens* are the sole, exclusive, and irrevocable proprietors of the mines. On the face of the deed it is clear, distinct, and precise, that the vendors are acting in respect of their interest on the one side, and that the five Defendants, including *Kantorowicz*, are acting as purchasers on the other.

It is sworn positively by several of the witnesses, and it is not contradicted by *Kantorowicz*, that the four looked on *Kantorowicz* throughout as a co-purchaser with them, and their acts correspond with it. They also affirm, and of this I can have no doubt on the evidence, that anterior to the execution of the contract of June, 1853,—which was in itself a defeasible contract, or more properly a contract which required perfecting by a complete acceptance within six months (although it was in one sense a contract, because it contained a clause of forfeiture of a sum of money if that acceptance was not declared),—the four were in constant communication with *Kantorowicz*, and availed themselves of his knowledge and information,—he being better informed about the property than any of the five, except perhaps *Werninck*; that they pressed him to get better terms than those proposed (*viz.* a million florins); and that he repeatedly stated to them, that the vendors would not sell for less than that price, that it was in vain to ask them, and that it was desirable to complete the purchase, because there was a *French* party in the field, who were desirous of making the purchase if they did not. And I can have no hesitation whatever in coming to the conclusion, that all five were acting as purchasers, the four believing that *Kantorowicz* had a common interest with them in obtaining the property as cheaply as possible; that the four availed themselves, as far as they could, of his assistance in endeavouring to obtain those cheaper terms; and that he made

the statement I have mentioned, that the vendors would not make a reduction of the price, he being secretly in the position of a vendor, or intending to place himself in that position.

Whether he was then actually in the position of a vendor, or merely intended to place himself in that position, is immaterial. The deed, which carries into effect the surreptitious arrangement between him and the vendors, is dated January, 1854, but it recites a previous contract of the 23rd of October, 1853; and therefore, though it may be, that there was no existing arrangement between the parties in June, 1853, when the deed was executed, it is plain there was such an arrangement in October, and before the declaration of complete acceptance, which declaration, of course, would never have been made by the four, had the transaction with *Kantorowicz* been then disclosed to them.

By the deed of June, 1853, all the five agree to purchase of the vendors for 1,000,000 florins, or about 85,714*l.*, on a deposit of 15,000*l.*, with a clause of forfeiture of one half that deposit, if complete acceptance were not declared within six months, which acceptance, when made, was to operate (as the deed expresses it) as an actual conveyance, for it was to have the immediate effect of passing the interest to the purchasers. And, in the interval,—in October, before the acceptance is finally declared,—*Kantorowicz* is again pressed by the four, to see if he cannot reduce the purchase-money, and repeats his representations as to the unwillingness of the vendors to reduce their price, and the improbability of a reduction. Under these circumstances, to permit *Kantorowicz* to say, as against his four co-purchasers, that, by virtue of a secret agreement with those very vendors with whom he was treating, he is to draw out of the purchase money this large sum of upwards of 20,000*l.*, would be contrary to every principle recognised either in this Court, or in any other

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1857.
 BUCK
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—
Judgment.

in which justice is administered; and this, in fact, has been the result,—so far as the matter has at present proceeded,—of the litigation that has taken place abroad.

Admitting, then, as it must be taken to be admitted,—and if not admitted, I have no hesitation in coming to the conclusion—that, as between *Kantorowicz* and his four co-purchasers, the transaction in question cannot for one moment stand, there arises the question,—and that no doubt is one of more nicety,—how far it can be considered to be a fraud upon the company.

As regards that question, the case is as peculiar as any to be found in the books. It stands thus: the original contract of the 15th of June, 1853, no doubt contemplated the formation of the company. It states, “such purchase to be for a society or company, which they intended to form among themselves, or with other parties, or exclusively for other parties.” The purchasers have, therefore, a right to call for a conveyance, in any of those three channels,—either to themselves alone, or to themselves jointly with others, or exclusively to others. Then they are to have six months to determine whether they will accept or not; from the day of acceptance they are to enter upon the real possession of the object of sale, in such a manner as if they had possessed and used the same from that date; and if they do not accept, there is to be a forfeiture of one half of the 100,000 dollars,—the 100,000 dollars being, in round numbers, 15,000*l.* sterling.

It is important here to look at the other contracts entered into on the 15th of June, 1853. There were two other contracts entered into on that day, one anterior, the other posterior, to the contract for sale. [His Honour stated the parties to, and the effect of, the first of these contracts, and the covenant therein by *Harris* to indemnify the other par-

ties in respect of the contribution of *Kantorowicz* and *Werninck* (a), and proceeded:—]

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In order to clear the matter with regard to *Harris*, I may say, that, after that, there is a letter of the same 15th of June, 1853, and an indenture of the 20th of July following, by which *Kantorowicz* and *Werninck* give him a lien on all their interest in the transaction, to the extent of a bonus of 1000*l.*, and also by way of indemnity, in consequence of his having entered into the covenant contained in the contract. As to that letter and indenture, I decided, without hearing counsel for the Defendant *Harris*, that, inasmuch as they were anterior to the delivery of the promesse d'actions, and any right that accrued from it, I could not deprive *Harris* of the benefit of such letter and indenture.

However, passing by the Defendant *Harris*, I come to the third contract, of the 15th of June, 1853. This is the one executed subsequently to the contract for sale.

[The VICE-CHANCELLOR stated the contents of this contract also, as above (b).]

After the third contract had been so entered into, the prospectus was issued. It does not appear who was the third, if there were a third, person who concurred with *Twynam* and *Carter* in issuing the prospectus; but, of course, it is impossible for *Kantorowicz*, claiming shares in the company, to do so in any other way than by adopting all that has been done by the committee; and, at all events, since the issuing of the prospectus, *Kantorowicz* has adopted and ratified it.

The prospectus is issued. It is intitled "The Prospectus of the *Wildberg* Great Consolidated Mining Company, to be

(a) *Supra*, p. 232.

(b) *Supra*, p. 233.

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conducted (until a royal charter for a *société anonyme* be obtained) under the *Prussian* mining law. In either case, the shareholders are free from all responsibility." It names five persons as constituting the committee of management of the proposed company. The Defendants *Carter* and *Twyman* are two of those persons. The Plaintiffs *Beck*, *Morris*, and *Underwood* are the other three. The prospectus, therefore, is put forward by gentlemen, two of whom were interested directly in the contract of purchase of the 15th of June, 1853, and must, of course, have been conversant of all its contents; and they are, at the same time, professing to act as the committee of management of the intended company, and, of course, therefore for the company. Acting in those two capacities, they hold out these propositions: They first expatiate on the value of the mine, stating, that a careful investigation has shewn what the value of the mine is.—I should state, they have previously described the capital to be 150,000*l.*: that is stated, in large letters, at the top of the prospectus. Having described the capital as 150,000*l.*, they proceed to describe the value of the mines, and then comes this passage, "a contract has been entered into," &c. [His Honour read the passage, which has been already extracted(a), down to the words "from the day of allotment."] Then the prospectus proceeds to describe the character of the mine, and the numerous reports made favourable to its prospects, representing the whole concern, as prospectuses usually do,—although it is not alleged, in this case, that it represents it erroneously, for every one seems to agree, that it is a very valuable and profitable investment.

The remarkable part of the case, and that on which the Defendants' counsel have mainly relied, is this: the committee, they say, have held out to the company, that they

(a) *Supra*, p. 234.

may buy, for 125,000*l.*, a mine which is fully of that value. Every person, who, after this, becomes a shareholder in the concern, becomes a purchaser at that price. The mine can be worked at a fair profit at that price. If so, how can any shareholder say he is defrauded, in having to pay a fair price for a fair profit. There is no evidence—nor is it even alleged in the bill—that any representation was ever held out to any shareholder as to the amount of what the prospectus calls the “premium.” All, therefore, of which the Plaintiffs complain, is simply this, that they have had to pay the sum they all agreed to pay, for property which is well worth the money.

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But this argument, as it appears to me, does not meet the whole of the case. The real nature of the case rests on the circumstance of *Carter* and *Twynam*, who were conusant of all the transactions, undertaking to act as agents both for the company (which they do in holding themselves forth as the committee of management) and for the persons who (as the prospectus expresses it) “incurred the risk and responsibility of the original purchase.” Standing in that position, *Carter* and *Twynam* are not merely representing the mine as worth 125,000*l.* Throughout the prospectus they are representing it as worth a great deal more,—as a most advantageous speculation, which they the committee of management have secured on certain terms—those terms being 125,000*l.*; and that sum of 125,000*l.*, they say, we have named, because, in our judgment as to what was right and proper in the transaction, we could not estimate a less sum than that, regard being had to the necessity of providing for preliminary expenses, and for a premium to the parties who incurred the risk and responsibility of the original purchase. Dealing for the company, they would be bound to keep down that premium within as reasonable bounds as they well could. They had a right to sell high, but in bringing out this concern, they were bound to make a reasonable

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Judgment.

contract; and, in their judgment, the reasonable contract was, that the premium should be 30,000*l*. It is not stated on the face of the prospectus, but they all swear,—although it hardly required their oaths, because the facts unquestionably proved it,—that they thought they were to pay the whole 85,714*l*. to the original proprietors. Of course, therefore, they thought the premium would be the difference, after deducting the preliminary expenses (about 9,286*l*.), between that sum of 85,714*l*. and the sum which they were about to fix for the company to pay; and they, exercising their best judgment on behalf of the company on the one hand, and of the vendors on the other, say to *Kantorowicz* and the other vendors, “we think it reasonable, as between you, the vendors, and the company, (and we are both the company and also a portion of yourselves), that the premium should be fixed at 30,000*l*.; and, consequently, that the company should pay 125,000*l*.” Observe, when the passage occurs in which they fix that sum for the company to pay, they are explaining to those who are invited to become shareholders the justification of so large a capital. The explanation applies not merely to the 25,000*l*. provided for working capital, but also to the amount of the purchase money. “Among other things” (they say) “we put in 25,000*l*. for working capital. It is believed, however, that 15,000*l*. will be sufficient, and if so, we will save it you, and will not issue the shares.” Why should they not, in pursuing the same just course of dealing between the company and the proprietors, say, “we believe this 30,000*l*. premium is right and proper, we provide for it by fixing the purchase money at 125,000*l*.; but if the premium can be provided without raising so large a sum as 125,000*l*., a smaller sum shall be raised, and the shares representing the difference shall not be issued, any more than the shares representing additional working capital, in the event of no such additional working capital becoming necessary.”

It appears to me to be plain, that, after the prospectus was issued, which was in November, the moment any person took shares in the company, he became entitled to share in all the interest the purchasers might acquire under the contract, upon their making the declaration of complete acceptance. And, for this reason, I do not think it material whether the declaration was made in terms for this particular purchase, because, upon the issuing of the shares in November, the moment the mine was acquired, it was acquired of course for the benefit of the company, whoever the trustees might be that might so hold it. True, it was so acquired for their benefit, upon their paying the apparent price of 125,000*l.*; but two of the parties who were to participate in the benefit, believed that price to be necessary, in order to provide for the premium, and for preliminary expenses, and, in fixing that price, believed they were providing, and intended to provide, for a premium of 30,000*l.*, and no one of the parties ever had any notion of providing for a larger premium. Then, in January, 1854, when the purchase is to be completed, and the residue of the purchase money paid, it turns out that the original proprietors, the *Hunsdieckers* and the widow *Merttens*, have only to receive a trifling balance, representing some 665 shares; but for the fraudulent conduct of *Kantorowicz*, the premium of 30,000*l.*, as well as all preliminary expenses, might have been provided for at a price less by 20,000*l.* and upwards, than that fixed by the prospectus as the price to be paid by the company for the purchase of the mines.

I know of no case, nor is it likely that I should find one, exactly like the present; but there is a case (although I thought it had more bearing upon the present than it has) which serves to shew that the mere circumstance of the company having got all that they bargained for, does not affect the matter. It is the case of *Frazer v. Jones* (a),

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 KANTOROWICZ
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 CARTER.
 KALE
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 Judgment.

(a) 5 Hare, 475.

1857.
 BECK
 v.
 KANTOROWICZ.
 KANTOROWICZ
 v.
 CARTER.
 KALB
 v.
 KANTOROWICZ.
 Judgment.

before Vice-Chancellor *Wigram*. A person was indebted to a banking company, and, the banking company pressing for a security, he gave them a security, reciting, but falsely, that he had deposited the deed, of which the security consisted, with one *John Jones*, to secure 1,000*l.* and interest due from him to *John Jones*; his object being not only to reserve to himself the benefit of the security to the extent of the 1000*l.* and interest, but also to retain the deed for future emergencies. And, in fact, he went afterwards to the identical *John Jones*, and borrowed money of him, depositing the deed as a security. The question was as to the priorities of the two mortgagees, *John Jones* and the banking company, both being equally innocent. The Vice-Chancellor decided in favour of the banking company. He said it was true that the banking company would have all they contracted for, even if they were postponed, and they were in truth contending for the benefit of a rule of law, which entitled them to a better security than they expected to obtain: but, on the other hand, he could not tell what terms they would have made had they known the truth: further than that, the legal interest had been conveyed to them subject to a nonentity. If *John Jones* had really taken the security which the mortgagor recited that he had, and the mortgagor had afterwards paid off that charge, the company would have taken the property.

The case was eventually determined upon this latter ground—viz. by reference to the legal interest of the parties; but it is an authority for the proposition, that, even in the case of persons equally innocent, the circumstance that the one who comes into equity for relief will lose no part of his bargain if that relief is withheld, is not an answer to a case of this description. Here, the company get their whole bargain, even if they pay 125,000*l.* for the mine; but they had a right, as against the members of the committee of management, to the best bargain that the latter, had they

known the facts, would have been in a position, acting fairly and rightly, to give them. The committee, one and all, distinctly depose, and *Werninck* and *Moriarty* depose, that their intent was thus to act. They comprise four of the five parties to the original contract for the purchase of the mine, and any three can sell. All of the parties, I may say, agreeing to the sale for this particular purpose, it is not competent to *Kantorowicz* to keep back the transaction by which he gets this bonus of 20,000*l.* in addition to his share of the premium. Having kept back that transaction, he must be taken to have joined with his co-vendors in contracting for the 30,000*l.* premium, and no more. He has allowed them, in the exercise of their judgment as to what was a right premium to demand of the company, to contract with the company for the 30,000*l.*; and that contract, as it appears to me, is the one which ought to be performed as between the company and the Defendants *Carter* and *Twynam*, and the other parties who concurred with him in the original purchase.

1857.
BROK
v.
KANTOROWICZ.
KANTOROWICZ
v.
CARTER.
KALB
v.
KANTOROWICZ.
—
Judgment.

That being so, the assignment by *Kantorowicz* of the promesse d'actions, as it was a fraud against *Carter* and *Twynam* and the rest of his co-purchasers, so was it a fraud against the company, who had, through the agency of the vendors, a contract for the purchase.

The case is not free from difficulty, but I think that is the plain sense and honesty of the transaction.

DECLARE, that the Defendants *Kantorowicz* and *Kalb* respectively are not entitled, as against the Plaintiffs and the other shareholders in the company, to the benefit of any of the 10,725 shares contracted to be given by the promesse d'actions in the bill mentioned, for that such promesse d'actions is fraudulent and void as against the Plaintiffs and such other shareholders, except so far as the same relates to 665 shares in the company secured or promised to be allotted to the widows *Hunsdiecker* and *Mertens*, and *Leopold Hunsdiecker*, the original vendors of the mines in the bill mentioned.

*Minute of
Decree.*

1857.
 BECK
 v.
 KANTOROWICZ.
 KANTOROWICZ
 v.
 CARTER.
 KALB
 v.
 KANTOROWICZ.
 —
*Minute of
 Decree.*

Declare, that the Defendant *Harris* is entitled, under and by virtue of the letter of the 15th of June, 1853, and the indenture of the 20th of July, 1853, in the pleadings mentioned, to a charge on the 2,425 shares in the company, and the sum of 802*l.* 3*s.* 9*d.* now in the hands of the Defendants *Carter* and *Twynam*, as a security for any moneys due to him under and by virtue of such letter and indenture; and that, subject to such charge, the Plaintiffs, on behalf of themselves and the other shareholders in the company, are entitled to a lien on the last-mentioned shares and sum of 802*l.* 3*s.* 9*d.*, by way of indemnity against any demand which may be made by the Defendants *Kantorowicz* and *Kalb*, or either of them, for a transfer or allotment of shares in respect of the promesse d'actions, and also in respect of this suit, and the two suits of *Kalb v. Kantorowicz* and *Kantorowicz v. Carter*, but not including the costs of the suit in the Prussian courts.

Dismiss the bill in *Kantorowicz v. Carter*, with costs.

SMITH v. LIDIARD.

*Feb. 26th &
 March 8th.*

*Will—Class—
 Nephews and
 Nieces.*

A testatrix having given legacies to several persons by name, describing each as her niece, bequeathed her residuary personal property upon trust for her respective "nephews and nieces," in equal shares. Two of the legatees in the will called nieces, were nieces not of the testatrix but of her late husband:—*Held*, that the circumstance that the testatrix had, in her will, called these two her nieces, did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest, so as to make it include all the nephews and nieces of her husband living at her death, nor even to include the two legatees whom she had called her nieces in the will.

ANNE ANDREWS, widow, by her will, dated in 1855, gave to the Plaintiffs *George Smith* and *James Andrews*, all her personal estate, upon trust to get in and convert the same, and to stand possessed thereof, upon trust, for the payment of her debts, legacies, and funeral and testamentary expenses; and the will then proceeded as follows:—"I give and bequeath the following legacies, or sums of money, unto the several persons hereinafter mentioned: (that is to say) unto my three nieces *Lucy Lidiard*, *Martha Beck*, and *Mary Burfitt*, the sum of 1,000*l.* each, to and for their respective use and benefits; unto my niece *Emilie Andrews*, daughter of *Henry Andrews*, of *Windsor*, the sum of 500*l.*, to and for her sole use and benefit; unto my niece *Louisa Walters*, another daughter of the said *Henry Andrews*, the

sum of 500*l.*, to and for her sole use and benefit; unto my four nieces, the daughters of *John and Lucy Butler*, residing at *Swindon, Wiltshire*, the sum of 200*l.* each, to and for their respective use and benefit; unto *Charles Andrews*, of the *High-street, Cheltenham*, aforesaid, bookseller, the sum of 500*l.*, to and for his own use and benefit; and as to the residue of my said personal estate, consisting of money, upon trust, that my said trustees shall divide the same between my respective nephews and nieces, in equal shares and proportions, share and share alike; I give unto the said *Mary Burfitt* my diamond ring, with five stones, and my silver tea-service to match; unto the said *Martha Beck* I give my green and white ring, and my silver dressing-case; I give unto the said *Lucy Lidiard* my black and white ring, with brooch to match, a plain silver teapot, and my silver teaspoons; and to the said *Mary Burfitt* and *Martha Beck* I give the rest of my silver spoons; and as to the rest of my jewels, trinkets, and wearing apparel, I give the same to my several nieces, equally to be divided between them by my said trustees; and I nominate and appoint the said *George Smith* and *James Andrews* executors of this my last will and testament. I give and bequeath all my linen to my nieces *Lucy Lidiard*, *Martha Beck*, and *Mary Burfitt*, equally to be divided between them."

1857.
SMITH
"LIDIARD.
Statement.

The bill in this suit was filed by the executors.

The questions were, whether the bequests of the residuary personal estate, and of the rest of the jewels, for the benefit of the nephews and nieces of the testatrix, intended to comprise as well the nephews and nieces of her husband as her own nephews and nieces. *Emilie Andrews* and *Louisa Walters* were children of a brother of the testatrix's late husband, and were not related by blood to the testatrix. *Lucy Lidiard*, *Martha Beck*, *Mary Burfitt*, *Martha Jane Butler*, and *John Butler* were children of sisters and

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Argument.

of a brother of the testatrix, and were related to her by blood.

Mr. *J. H. Law*, for the Plaintiffs, the trustees and executors of the testatrix.

Mr. *Amphlett*, for some of the nephews and nieces of the testatrix.

Mr. *Surridge*, for others of the same class, referred to *Shelley v. Bryer* (a).

Mr. *Brodrick*, for nephews and nieces of the husband of the testatrix, some of whom were named in the will, argued, that all were included, or, at any rate, those mentioned in the will, and whom the testatrix had thereby herself referred to as her nephews and nieces. He cited *Hussey v. Berkeley* (b), *James v. Smith* (c), *Meredith v. Farr* (d), *Evans v. Davies* (e), and *Owen v. Bryant* (f).

Mr. *Amphlett*, in reply.

The VICE-CHANCELLOR reserved judgment.

March 9th.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In this case, the only point that remained to be determined was, whether or not, under the residuary bequest to nephews and nieces of the testatrix, the nephews and nieces of the testatrix's husband could take.

The authority most in favour of the contention on behalf

(a) Jac. 207.

(b) 2 Eden, 194.

(c) 14 Sim. 214.

(d) 2 Y. & C. C. C. 525.

(e) 7 Hare, 498.

(f) 2 De G., M'N. & G. 697.

of the nephews and nieces of the husband, was the case of *James v. Smith* (a), in which, a testatrix having described one grand niece as her niece, and having subsequently made a gift to nephews and nieces, the Court held that grand-nephews were to take under the description of nephews, because the testatrix had indicated, by her will, who they were that she conceived were related to her in that degree. That by no means goes the whole length of the argument in this case, which would introduce entire strangers in blood, not only those born at the date of the will, but those who should come into existence subsequently to the date of her will and before her death, to equal participation with the testatrix's own nephews and nieces.

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Judgment.

There is no case precisely like this; but the decision in *The Corporation of Bridgnorth v. Collins* (b) assists in throwing some light on it, though it is not so strong against the claim of the persons there called "cousins," as the circumstances here are against the claim of the nephews and nieces by marriage. A question arose in that case, as to whether first cousins once removed could be let in under the description of second cousins, and the Vice-Chancellor held that they could not. The argument in favour of the first cousins once removed was, that they were not only as nearly related as second cousins, but that the testator had, in one part of his will, called persons not related to him at all "cousins," raising an indication of his intention to include in that description a large class of persons. The Vice-Chancellor says, "The testator may have called some persons his cousins who were not so, but that only shews that he made a mistake as to them; my opinion is, that those only who stood in the relationship of second cousins of the testator are entitled to share in the fund;" that is, he thought that naming persons "cousins" in the will, who

(a) 14 Sim. 214.

(b) 15 Sim. 541.

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 —
Judgment.

were not cousins, did not enlarge the operation of the word "cousins" in the gift to them as a class.

Can it be safely inferred here, from the mere circumstance of some strangers in blood being described by terms of affection as the testatrix's own nieces, that it was her intention to let in all other strangers in blood, who stood in the same relationship to the husband as these persons. I think that I am not at liberty to let in a large class of persons, merely from the circumstance of her having selected some of the class as objects of her favour, and having bestowed on them, although her husband's nieces and not her own, the title of nieces.

The more difficult question was, whether the specially favoured individuals described as nieces, who were only nieces of the husband, could claim to participate in the residue under that designation. I do not think I can so decide, because it is similar to those cases where there are gifts to illegitimate children by the description of children, and then a bequest to all the children of the reputed parent, and yet the illegitimate children previously named have been excluded. In one case, *Owen v. Bryant* (a), where the word "said" occurred, which referred back to the children before designated, they were admitted; but in another (b), although there was an illegitimate child of a particular female named, yet it was held, that a gift to "all her children" would not include illegitimate children, or apply to any but subsequently legitimate children. These decisions do not depend on the doctrine of an illegitimate child being *filius nullius*, because I take it, where the illegitimate child is described as the child of the mother, the parentage can be ascertained as that of the mother and not of the father. Here, the testatrix has chosen to benefit particular persons, calling them her nieces,

(a) 2 De G., M'N. & G. 697.

(b) *Meredith v. Farr*, 2 Y & C. C. 525.

who are not any blood relations at all; and then she has made a general bequest to nephews and nieces, not confining it to those named before (for no nephews had been named at all); and I cannot hold, that, under that general gift, nephews and nieces of the husband can be included. I must therefore make a declaration in favour of the proper nephews and nieces of the testatrix.

1857.
SMITH
v.
LIDIARD.
Judgment.

BENDING v. BENDING (α).

March 24th &
26th.

JOSEPH BENDING, by his will, in 1853, after appointing two persons, named *Mackeson* and *Cubitt*, to be executors and trustees thereof, proceeded to devise as follows:—
“First, I give unto my wife all my household furniture, money, securities for money, and all other my personal estate of every description, to hold the same unto my said wife for her absolute use and disposal, she paying thereout my just debts, funeral and testamentary expenses, and also a legacy of 50*l.* to *John Dunnell*. I direct my said executors and trustees, or the survivor of them, his heirs and assigns, as soon as convenient after my decease, to proceed to a sale by auction of *all my freehold and copyhold estates wheresoever situate*, lying, and being; and after paying all

Will—Dower
—Election.

Powers of or trusts for sale, created by will over real estate, are not (as leasing powers have been held) inconsistent with a widow's right to dower.

Nor is her claim affected by any direction as to the distribution of the proceeds.

There is no such rule, as that, where a testator's widow is entitled under his will to what would exceed her dower, she is, thereby, put to her election.

Where a testator, by his will, directed his trustees to sell “all his freehold and copyhold estates wheresoever situate,” and gave his widow half of the proceeds, and also half of all his personal property (except certain articles specifically bequeathed to her):—*Held*, that she was not bound to elect between her dower and the benefits given her by the will.

The authorities on this subject examined, and observations on *Chalmers v. Storil* (2 V. & B. 222), which is imperfectly reported.

(α) See 1 Jarm. on Wills, pp. 382 to 393.

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 ———
Statement.

expenses attending the said sale or sales, I do give one half of the proceeds of the said sale, after payment of the said expenses as aforesaid, unto my said wife absolutely, one-fourth part of the said proceeds unto my half niece *Miranda*, and the remaining one-fourth part unto *Thomas Bending*."

The testator made a codicil to his will, as follows:—
 "Whereas, by my will I have given all my money, securities for money, and all my personal estate, unto my wife. Now, my intention is to give my household furniture, plate, and effects in and about my dwelling-house to my said wife, and no more, except the said half mentioned in the said will; and all my money, securities for money, and all other my personal estate should be divided in the same proportions as my real and copyhold estates; and that the legacy of 50*l.* to *John Dunnell* should be paid out of my money and personal estate, also my just debts and funeral expenses."

The Chief Clerk having found that the testator's widow was dowable out of a freehold house of which he died seised in fee, the question, on further consideration, was, whether she was bound to elect between her dower and the benefits given her by the will.

Argument.
 ———

Mr. *Hallett*, for the Plaintiff *Thomas Bending*; and

Mr. *H. Clarke*, for the Defendant *Miranda* and her husband, contended, that the widow was put to her election.

By the effect of the will and codicil taken together, the whole of the real property, and (with the exception of the household furniture, plate, and effects mentioned in the codicil) the whole also of the personal property, are united

and directed to be sold, and the entire proceeds are to be divided into two equal moieties, one for the widow, the other for the Defendants in equal shares. "By directing all his real and personal estate to be equally divided, the testator intended the same equality to take place in the division of the real as of the personal estate, which cannot be if the widow first takes out of it her dower:" per Sir *William Grant* in *Chalmers v. Storil* (a). "The real and personal estate are united together, the personal estate is not subject to any antecedent claim; and is not the real estate intended to be given in the same manner?" per Sir *Thomas Plumer*, M. R., in *Dickson v. Robinson* (b), *Roberts v. Smith* (c), *Reynolds v. Torin* (d), *Parker v. Downing* (e).

In *French v. Davies* (f), which will be cited contra, equal division was not intended. In *Ellis v. Lewis* (g), the testator intended to give no more than he himself could have sold; and so in *Gibson v. Gibson* (h), where, by the words "for all my estate and interest therein," he shewed he had no intention to pass what did not belong to him.

Hall v. Hill (i) shews, that the Court will "look at the whole frame of the will, and its several provisions;" and that where, as here, "the will shews an intention, on the part of the testator, to provide for his wife by his will, and that she is to have nothing but what he gave her by his will," it is a case for election. In *Hall v. Hill*, as here, "the widow acquired under the will a much greater provision than she would have been entitled to as dower in the ordinary way," and upon that ground coupled with the former, Lord *St. Leonards* held that she was barred (k). And compare *Warbutter v. Warbutter* (l).

(a) 2 V. & B. 222.

(b) Jac. 403.

(c) 1 S. & S. 513.

(d) 1 Russ. 129.

(e) 4 L. J., Chanc., N. S. 198.

(f) 2 Ves. jun. 572.

(g) 3 Hare, 310.

(h) 1 Drew. 42.

(i) 1 Dru. & W. 94, 107.

(k) Id. 108.

(l) 2 S. & G. 163.

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 BENDING
 v.
 BENDING.
 —
 Argument.

Mr. *Caldecott*, for the widow, contended, that, there being nothing in the will inconsistent with the assertion on the part of the widow of her right to have one-third part of the land set out by metes and bounds, she was not put to her election: *French v. Davies* (a).

By the words "all my freehold and copyhold estates," the Court will not take the testator to mean his wife's estate, or "gather from his having given all he *has*, that he has given that which he *had not*:" per Lord *Thurlow* in *Foster v. Cook* (b). The circumstance of there being a trust for sale is immaterial; the sale would be subject to dower, and the proceeds would represent the gross value minus the value of the dower: per Sir *James Wigram*, V.C., in *Ellis v. Lewis* (c), *Gibson v. Gibson* (d). And if the trust for sale does not import an intention to pass the land otherwise than subject to dower, the direction as to the application of the proceeds cannot affect the case. No such direction can decide what the subject of sale is: per Sir *James Wigram* (e).

In *Chalmers v. Storil*, *Dickson v. Robinson*, and *Roberts v. Smith*, it was the specific land that the testator intended the parties to enjoy in the proportions specified, not, as here, the proceeds of the sale of his interest in the land.

Mr. *Hallett*, in reply, contended, that the power of sale extended to the whole land. The words were "all my freehold and copyhold estates wheresoever situate."

The VICE-CHANCELLOR said, he thought the case was like *Ellis v. Lewis* (f), but he should not decide it without examining the authorities.

Judgment reserved.

(a) 2 Ves. jun. 572; and see *Birmingham v. Kirwan*, 2 Sch. & Lef. 441.

(b) 3 Bro. C. C. 347, 351.

(c) 3 Hare, 313, 314.

(d) 1 Drew. 42, 59.

(e) 3 Hare, 314, 315.

(f) Id. 310.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This is a question of some importance, viz. whether the widow of the testator *Joseph Bending* is entitled to the benefits given her by his will, without electing between those benefits and her right to dower.

1857.
BENDING
v.
BENDING.
Judgment.
March 26th.

The will is very short. [His Honour read the will and codicil.]

It was argued, that the case must fall within the principle of *Chalmers v. Storil* (a). There, the testator gave to his wife and his two children (a daughter and a son) "all his estates whatsoever, to be equally divided amongst them, whether real or personal;" his daughter to have an equal share with his son of all his property, after paying certain legacies. The Reporter adds, that the testator then "*specified* the property bequeathed by him as consisting of freehold ground rents, money on mortgage, *American Bank Stock*, and estates in *America*," &c., and proceeded to direct, that, in case of his wife's death, the portion or part bequeathed her should descend to his two children equally; and, in the event of both their deaths before her, that she should enjoy, during her life, the portion or portions bequeathed to them; and in the event of the deaths of his wife and two children, he made other gifts over. It is plain, that this case is very imperfectly reported as to the instrument itself. Sir *William Grant* first says this: "as to the widow's right to dower, whether she took under the will an absolute interest or for life only, it is a case of election; the claim of dower being directly inconsistent with the disposition of the will. The testator directing all his real and personal estate to be equally divided, &c., the same equality is intended to take place in the division of the real as of the personal estate; which cannot be if the widow

(a) 2 V. & B. 222.

1857.
 BENDING
 v.
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 —
Judgment.

first takes out of it her dower, and then a third of the remaining two-thirds." Then he adds, what shews that there must be some important omission in the Report: "Further, by describing his *English* estates," (there is no such description in the will as it is stated by the Reporter), "he excludes the ambiguity which Lord *Thurlow* in *Foster v. Cook* (a) imputes to the words "my estate" as not necessarily extending to the wife's dower. Here, the testator says, the property thus bequeathed by him consists of these particulars. It is therefore the property itself thus described that is the subject of the devise; and not what might, in contemplation of law, be the testator's interest in that property. This is therefore a case of election." So stated, no one could hesitate to say, that this seems to be the right conclusion. The words on which Sir *William Grant* appears to have founded it, are not reported in the statement of the will. He seems to have relied on some specific statement in the will as to what the property was which the testator devised, and to have therefore concluded that the testator was not giving his estate in the property, but a certain share of the property itself to be enjoyed by the wife.

Therefore, rightly viewed, the case of *Chalmers v. Storil* is no exception to the rule laid down by Lord *Thurlow* in *Foster v. Cook* (a)—which has been the governing rule in most of the subsequent cases, (although there has been some discrepancy between the Judges),—viz. that where a testator says, "I give all my estate," he does not mean to give his wife's estate, that is, her right to dower.

Unfortunately, Lord *Alvanley* seems to have taken a more favourable view than other Judges as to the wife's claim; and, in one case, *Strahan v. Sutton* (b), when pressed with the impossibility of giving effect to the will con-

(a) 3 Bro. C. C. 347.

(b) 3 Ves. 249.

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BENDING
v.
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Judgment.

sistently with the widow's claim to dower, since she might insist on having one-third set out by metes and bounds, he attempted to evade that argument by denying that there was any necessity for the widow to claim her dower in that form. "It has been determined," he said, "that the widow need not take it by metes and bounds; she may take a rent-charge; she may take one-third of the rents and profits." That, however, is not now the law of the Court.

The law of the Court at the present day, is that laid down by Lord *Redesdale* in *Birmingham v. Kirwan*, where he says, that, if you find anything in the will which is inconsistent with the assertion on the widow's part of her right to have one-third of the land set out by metes and bounds, that raises a case of election.

Different Judges have come to different conclusions as to what is such an inconsistency. In *Chalmers v. Storil*, the testator directed the very land itself to be equally divided, and that could not be done consistently with the widow's claim. That has since been followed by Sir *Thomas Plumer*, in the case of *Dickson v. Robinson (a)*, which seems to be exactly similar. There, the testator directed an equal partition of the *land*, for the equal benefit of his wife and children: and it was inconsistent with her taking that share of the property, that she should also have her dower.

In *Roberts v. Smith (b)*, the Vice-Chancellor recognises the law as laid down in *Chalmers v. Storil*. By the will, in *Roberts v. Smith*, the annual produce—the identical rents—were directed to be divided and paid, as to one half part thereof to the testator's wife for her life, for the maintenance of herself and her children by her former husband; and, as to the other half, for the maintenance of the testator's own

(a) Jac. 403.

(b) 1 S. & S. 513.

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 Judgment.

children. And the Vice-Chancellor held, that the testator intended by that to give the whole of the rents anterior to the wife taking any share by metes and bounds. He collected from the will, that the identical rents were intended to be divided, and that being so, it was a clear case of election.

Here, I have a simple case of a trust for sale. Whatever difficulty has arisen upon powers of leasing, it is obvious, that, if they are inconsistent with a wife's right to dower, as it seems now to be thought, there is no such inconsistency in the case of a power of sale, or a trust for sale. It is every day's practice that a person directs his estates to be sold; and they are sold subject to the rights to dower, and the widow has her dower first set out. For this I have the authority of Lord *St. Leonards*, in the case of *Hall v. Hill*: he says, "I am not aware how the power of leasing, in this case, can be exercised over all the estate, if the widow's right to dower be allowed. One can understand how the rents might be enjoyed, *or the estate sold*, subject to the claim for dower; but how could you demise an estate subject to the right of this lady to have a third part thereof set out by metes and bounds" (a)? I am glad to have so difficult a problem, in which so many Judges have differed, decided by his authority.

I am further fortified in my view by the observations, which seem to be unanswerable, of Vice-Chancellor *Wigram* in *Ellis v. Lewis* (b), where he says, the law is clearly settled that a devise of lands, *eo nomine*, upon trust for sale, does not per se import an intention to pass the land otherwise than subject to the legal incident of dower; what the testator directs to be sold being not his wife's estate in the lands, but his own; and then, "if that be so, it is impossible," he says, "that any direction for the application of the

(a) 1 Dru. & W. 107.

(b) 3 Hare, 310, 313—315.

proceeds of such sale can affect the case. The devise is of land subject to dower. The trust to sell, is a trust to sell subject to dower; and the proceeds of the sale will represent the gross value of the estate *minus* the value of the dower. Whatever direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched (a). . . . So the direction to divide the proceeds of the sale cannot decide what the subject of the sale is" (b).

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But if there be a clear indication on the face of the will that positive equality was intended,—that the widow was intended to be in no better position than the children, after taking into account her own rights, independently of the will, and those which the will has given her,—of course that must be followed; and, in such a case, her right to dower will be excluded.

That was the case in *Hall v. Hill*. There, Lord *St. Leonards* thought, that, looking to the whole of the will, the wife was not intended to be in a better position than the other devisees; and then he makes this observation, which is commented upon by Sir *John Stuart*: "If I am bound to spell out the intention of the testator, I think, looking at the whole frame of the will and its several provisions, that the testator meant to provide for his wife by his will, and that she was to have nothing but what he gave to her by the will" (that was a point to be ascertained). "He gives her a house, and the furniture. He gives her also an annuity out of the general estate: and she has acquired, under the will, a much greater provision than she would have been entitled to in the ordinary way. That she is of this opinion is evident, because she has elected to take under the will, if required to make an election. I hold, therefore, that she is barred of dower, and that by

(a) 3 Hare, 314.

(b) *Id.* 315.

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clear implication. I have satisfied myself of the intention of the testator." And then he repeats, that he despairs of reconciling the authorities, but follows what he considers the best.

Vice-Chancellor *Stuart* has observed, in reference to that passage, that he rather thinks that *Hall v. Hill* is the first case which has gone the length of holding, that, when the wife is entitled under the will to what would be more than her dower, it is a strong indication of intention that she should not have the benefit of that and her dower also; and looking to the various motives that may actuate persons, it is evident that such a rule as this might open a door to difficulties, more than the Courts have had hitherto to deal with. If that were the test, it is clear that, in this case, the widow would have to elect; for she takes under the will more than her dower, the testator having given her half of his personal as well as of his real estate.

The only part which at all presses me in the judgment in *Chalmers v. Storil*, is the observation at the beginning with respect to the personal estate, viz. that, the testator having directed all his estates to be divided equally, it must be supposed that he intended to give the same interest in his real as in his personal estate, and that, as the personal estate was subject to no charge of dower, he did not intend the real estate to be subject to any such charge. But Sir *William Grant* did not rely on that circumstance alone. He relied upon the whole will; and considered, that, upon the whole will, it was the land itself which the testator intended to be the subject of equal division.

In this case, there is simply a direction for a sale of the whole of the estate, and that the produce should be divided equally between the parties. There is nothing in that inconsistent with the wife's right to have a third of the land

set out by metes and bounds. Therefore I must hold, that she is not put to her election.

I should have observed, that Vice-Chancellor *Kindersley*, in his judgment in *Gibson v. Gibson* (a), has taken the same view in reference to this question.

(a) 1 Drew. 42.

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LAFONE v. THE FALKLAND ISLANDS COMPANY. (No. 2).

March 14th.

THIS was a motion by the Plaintiff, that the Clerk of Records and Writs might be ordered to file replication in the suit, he having refused to do so under the following circumstances: The Defendants had put in a written answer, about 286 folios in length, and thereby they referred to a document, called their printed answer, as an exhibit, and prayed that it might be taken as part of their answer, and constantly referred to it and repeated the allegations therein, as if they had formed part of the answer, and verified such allegations. The written answer was filed, but not the printed document.

Incomplete Answer—Replication—Suitsors' Fee Fund.

A Defendant filed an answer in a suit, and thereby referred to a printed document, which was not filed, as an exhibit, and verified the statements in it, and constantly referred to them as part of the answer: Held, that the answer which was filed was incomplete without the printed document, and that the Clerk of Records and Writs was justified in refusing to file replication to it.

Mr. Hardy, for the motion:—

The Plaintiff wishes that the course of justice should not be obstructed. He is content to treat the printed document as no part of the answer; the written answer is regular enough. It may be said, that the Plaintiff could have excepted to the answer, or moved to take it off the file; but he did not choose to do so, and he certainly was not bound to do so, in order to secure the payment of the proper fees to the Suitsors' Fee Fund, for the sake of which this objection is now made.

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 Argument.

Mr. *James*, Q. C., and Mr. *J. H. Taylor*, for the solicitor to the Suitors' Fee Fund.

The VICE-CHANCELLOR.—I am clearly of opinion, that I cannot look at the printed document. I consider it as no part of the answer; but there is an answer filed, and why should not replication be filed to that.

Mr. *Giffard*, for the Defendants:—

This course has been taken for the sake of convenience. It matters little to the Defendants whether the printed document is filed or not. The expense, if it is filed, will fall upon the Plaintiff, as he will have to take an office copy of it. The Defendants have no objection to file it, if necessary.

Mr. *Hardy*.—The Plaintiff will agree that it shall be treated as an answer without filing it.

The VICE-CHANCELLOR.—The question is, whether the printed document is part of the records of the Court or not. One mode of settling that question would be, by filing a special replication to so much of the answer as is put on the file.

Mr. *James*, Q. C.—The object of the parties is to avoid paying the usual fees required by the practice of the Court. How can this printed document be used in the cause if it is not filed. Parties could not agree to use a bill which was not on the file.

The Court cannot deal with pleadings unless they are on the record; and the reason is, that unless they are so, they cannot be regarded by the Court of Appeal, or by the House of Lords in the last instance. No arrangement between the solicitors or counsel of the Plaintiff and Defendants can ever make this printed document part of the answer, unless it is filed like the rest of the answer.

[The VICE-CHANCELLOR.—If admitted at all, it ought to be deposited like a model or a map which is made an exhibit.]

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Argument.

At present, there is in truth no answer on the file. It is as though the answer consisted of ten skins, and three of these had been taken away, and the rest only filed.

Mr. *Hardy*.—The answer has referred to this exhibit just as though it had referred to the *Times* newspaper of a certain day, as containing a true statement of part of the Defendants' case. [VICE-CHANCELLOR.—The difference is, that the exhibit in this case is in truth another answer, and I shall admit that, if I allow replication to be filed. Is the Plaintiff obliged to take an office copy of the answer?]

Mr. *James*, Q. C.—Yes; I am told that he must do so before replication is filed, by the practice of the office.

[VICE-CHANCELLOR.—Suppose a Defendant were to file two skins of parchment, stating part of his case, and that the whole answer filled six skins, and were to swear to the remaining four skins as if they were filed, could the Court allow that?]

Mr. *Hardy*.—That would be like the case put by Mr. *James* in argument, an instance of an answer defective in itself; but here, the answer which has been filed is not so.

VICE-CHANCELLOR SIR W. PAGE WOOD.—

I think that the answer which has been filed, upon the face of it, is not an answer which satisfies the rules of this Court. It refers to the printed document as an exhibit, and verifies it; and then, throughout the written answer, there are constant references to the statements in the printed do-

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cument. The object of the record is, that the pleadings upon which the Court proceeds should be defined and preserved; but if such an answer as this were allowed, a Defendant might write on a piece of parchment, "It would cost me 20*l.* to file such a statement as is necessary to raise the issues to be determined in this case, and, therefore, I now file one skin, and I have prepared six or eight more, which with this make my answer; and I file only this one, and refer to the rest as an exhibit." It is obvious, that, if this were allowed, a Defendant's answer in future would consist of a few lines only. I can conceive a case in which special leave might be given to take such a course; but it seems to me that this is not such a case, and that when this cause comes to be heard I should not, in the present state of the pleadings, have any record before me on the part of the Defendants. I have no security, if the printed document be not filed, that it will be produced in the same state as it is now in at the hearing; and the Court ought, by having the pleadings recorded, to secure their being transmitted unchanged to the Court of Appeal.

I am of opinion, that this which has been filed is not an answer, and therefore there can be no replication. If the parties choose to waive an answer altogether, that is another thing. If not, the motion must be refused.

1857.

READE v. BENTLEY.

March 5th.

MR. READE having written a book, called "Peg Woffington," entered into the following agreement with his publisher:—

Copyright—
Agreement—
Author and
Publisher—
Partnership.

"Memorandum of an agreement, made this 3rd day of November, 1852, between *Charles Reade, Esq.*, of 10, *Great Russell-street, Covent Garden*, on the one part; and *Richard Bentley*, of *New Burlington-street*, publisher, on the other part.

An agreement between an author and a publisher, that the latter should publish a certain work at his own expense and risk, and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, and other incidental expenses, including the allowance of 10l. per cent. on the gross amount of the sale for commission—the profits remaining of any edition that should be printed, should be divided equally between author and publisher. The books sold to be accounted

"It is agreed that the said *Richard Bentley* shall publish, at his own expense and risk, a work at present intitled 'Peg Woffington,' and, after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments (if any), and other incidental expenses, including the allowance of 10l. per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one moiety to be paid to the said *Charles Reade, Esq.*, and the other moiety to belong to the said *Richard Bentley*.

"The books sold to be accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder, at a lower price, which is left to the judgment and discretion of the said *Richard Bentley*.

ed for at the trade sale price, unless it should be thought advisable to dispose of any copies or of the remainder at a lower price, which was left to the publisher's discretion:—*Held*, that this did not amount to an agreement for the sale of the copyright. That it was to be inferred from the agreement, that the publisher was to fix the selling price of the book, and that he was to be at liberty to publish more than one edition.

Whether the agreement created a partnership pro hac vice between the author and publisher—*Quære*.

The higher scale of costs mentioned in the Orders of Jan. 30th, 1857, applies to all cases except those specified in such Orders as subjects of the lower scale.

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 — —
Statement.

"In witness whereof the said parties have hereunto set their hands this day. It is understood between the aforesaid parties, that twelve copies of the said book are to be presented, free of charge, to the said *Charles Reade*, Esq.

(Signed, interchangeably,) { CHARLES READE,
 { RICHARD BENTLEY."

"Nov. 13th, 1852."

An edition of 500 copies, at the price of 10s. 6d. a copy, was published under this agreement. Nearly the whole of these were sold, and some profits were divided. When the edition was nearly sold, Mr. *Bentley* applied to Mr. *Reade* for permission to publish a cheap edition of the novel. Mr. *Reade* objected. Mr. *Bentley*, however, advertised the publication of an edition at 3s. 6d. a copy. Upon seeing this advertisement, Mr. *Reade's* solicitor wrote to Mr. *Bentley* a formal notice not to publish any new edition of the work; and a few days afterwards Mr. *Reade* signed and sent to the Defendant a written notice to dissolve, as and from the 20th of February, 1857, the partnership (if any) subsisting between them by virtue of the said agreement.

Mr. *Reade* then filed the bill in this suit for an injunction to restrain the publication of the advertised edition.

An interim order had been obtained, and this was a motion to continue it.

Evidence was given on both sides; but, as the point of interest to the Profession was the effect of the agreement, it is not necessary to state the evidence.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Faber*, for the Plaintiff:—

The injunction must be continued. The case is governed by *Stevens v. Benning* (a). This agreement is not for a sale of the copyright, but only for the publication of one edition, and did not authorise any further publication without the consent of the author. [VICE-CHANCELLOR—Who then was to fix the price of the first edition?] The parties to the agreement by mutual consent. [VICE-CHANCELLOR.—Is there not a partnership under the agreement until dissolved? Might not Mr. *Bentley* proceed to prepare a new edition until prevented by such dissolution?] If there were any partnership, it was only a joint adventure in the publication of this particular work, and no step could be taken without the consent of both parties. Otherwise, Mr. *Bentley* might publish at such a price as would just cover his own expenses and profit as a publisher, and leave not a farthing to divide with the Plaintiff; or he might publish it in such a form as would be injurious to the reputation of the Plaintiff. Therefore, if a partnership for more than one edition, it was a partnership at will and determinable at the desire of either partner.

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 —
Argument.

Mr. *James*, Q. C., and Mr. *Whitbread* for the Defendant:—

The publication is to be at the sole risk of the Defendant; therefore, there is no partnership. Partnership only exists where there is a participation in loss as well as profit. The Defendant had to determine all matters relating to the printing, paper, and embellishment, and advertising the work. He had to incur all expenses and take all the risk; therefore he must fix the price. Having published a first edition, incurred all the risk, and the work having become popular, it is absurd to suppose that it could be the meaning of the agreement, that the Plaintiff should be at liberty

(a) 1 K. & J. 168.

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Argument.

now to put an end to it, just when some profit might be expected. The plaintiff has no right to interfere with the publication: *Sweet v. Cator* (a). [VICE-CHANCELLOR.—According to your argument, he has virtually parted with the copyright for the life of Mr. *Bentley*.]

Mr. *Rolt* in reply.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It is unfortunate that publishers and authors should frame their agreements with so little precision, as from the case of *Stevens v. Benning* (b) and this case it appears they are in the habit of doing. At the same time, from what I see in this case, I feel more confident than I did in *Stevens v. Benning*, that there was no intention to dispose of the copyright by this agreement, because I cannot suppose that authors or publishers are so unaware of the importance and value of that right, as not clearly to express their intention when they mean the copyright to pass. I have no hesitation in coming to the conclusion, that this agreement is not, and was never intended by either party to be, a contract for the sale or purchase of the copyright.

The only real difficulty in the case is, to determine the true construction and effect of the agreement, and how far the Plaintiff is entitled, under all the circumstances, to come here at this moment for an injunction to restrain the Defendant from publishing a cheap edition of the work in question.

Now the agreement was, that Mr. *Bentley* should publish at his own expense (I do not know whether the words

(a) 11 Sim. 572.

(b) 1 K. & J. 168.

"and risk" make any difference, because expense and risk have the same meaning,) a work at present intitled "*Peg Woffington*;" and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments (if any), and other incidental expenses, including the allowance of 10 per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one moiety to be paid to the Plaintiff, and the other moiety to belong to the Defendant.

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So far, I think, there can be no doubt that the contract provided, as long at all events as it should be subsisting, that Mr. *Bentley* was to be the publisher of this work; and it was in the contemplation of both parties, that, in so publishing, he should publish several editions. I do not say whether that might not be put an end to; but the original contract, I think, contemplated the possibility at least of Mr. *Bentley* publishing several editions, and that all the editions should be published at his risk; and that, after deducting certain charges and his commission, he should hand over to the Plaintiff a moiety of the profits of the several editions which should be so published. The question then arises, if Mr. *Bentley* was to publish at his own risk, who was to fix the price of the work? The agreement is entirely silent upon this point, and it is left to be inferred from the nature of the contract between the parties.

I am decidedly of opinion, that the Plaintiff's view, that he was to have a voice in fixing the price, is not consistent with the terms of the agreement. I think, if he intended to retain such a power, it is scarcely possible to conceive that he should have allowed a term so important to be omitted from the agreement; and when I look to the words of the agreement, I see that Mr. *Bentley* is to be the publisher, that he is to bear the expense, and to make all pay-

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—
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ments; and considering also, that it is the business of the publisher to make his expenses and profits balance, that he is the person to whom the author has entrusted that department, the publisher taking the whole charge and risk and the whole duty of bringing out the work as he thinks best for the interest of both parties, it seems to be necessarily incident to the duty which he has to perform, that he should have the right also of determining the price at which the work should be brought out. I think the construction of the agreement is plain enough up to this point, that the Defendant, the publisher, is to fix the price of the work; that he is to choose the embellishments and everything else connected with its publication; and that he is to do this for all editions which should be brought out during the subsistence of the agreement.

Several difficulties arising upon such a construction have been suggested. It was argued, can it be supposed that the Plaintiff intended to give to the publisher the power, if he chooses, of bringing out the work with absurd embellishments beneath its character and injurious to the reputation of the author? The simple answer to that is, the author will take care of himself in that respect by going to a respectable publisher who would not commit any such absurdity. If he employed a publisher who was in the habit of adding ridiculous illustrations to his works, he would not have reason to complain if the work were so published. The author would select a publisher who, he would presume, would bring out the work in a manner creditable and desirable.

So again, with regard to the price, it is suggested, that the publisher might just so arrange the balance of prices as to enable himself, by an accurate calculation, to get his 10 $\frac{1}{2}$ per cent. commission, and leave nothing to pay the author. The answer is similar: it is not to be supposed

that the author would deal with any publisher who was in the habit of so treating authors. If a publisher were to act in such a manner, although perhaps such conduct could not strictly be called a fraud, because it might not be a violation of the specific terms of the agreement, the result would be, that the author whom he so treated would never contract with him again. But it by no means follows that the contract is absurd upon the face of it, because *Mr. Bentley* might possibly make it less advantageous to *Mr. Reade* than *Mr. Reade* had a right to expect. It is not very likely that a publisher should act in the manner suggested, because, of course, it is for the interest of the publisher as well as the author that the work should sell in such a manner as to produce a surplus profit after payment of commission and of other charges, as the publisher is to have one-half of such profit. It was argued, however, that the clause as to price, which I am about to read, militates against that view. It provides, that the books sold shall be accounted for at the trade sale-price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies or of the remainder at a lower price, which is left to the judgment and discretion of the said *Richard Bentley*. There being this special clause, shewing, that in a particular case the diminution of price is to be left to the discretion of the publisher, it was argued, that the inference is, that the publisher has no such discretion, except in the particular case there mentioned. It is quite obvious, that this clause was introduced with no such view, but because *Mr. Bentley* is to bring out the work, and in bringing it out, he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price

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which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. *Bentley* first agrees to account with the author for all copies at the trade price; but then as that might be rather too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed, that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price.

The only remaining question upon this contract is, how far Mr. *Reade* is at liberty to determine it; and it appears to me, for the purpose of this injunction, that he is not at liberty to determine it as regards this edition. I do not think it necessary to go beyond saying that I regret that these contracts are drawn with so little precision; and I think it may be a point of considerable difficulty, if it is to be determined hereafter what the true purport of a contract of this description may be as between the author and publisher, with reference to the power of Mr. *Reade* to determine it with regard to subsequent editions. On the one hand, if he be not at liberty to determine it, then as long as Mr. *Bentley* performs his part of the contract, and is ready and willing to publish a series of editions during his lifetime in the manner provided for by the agreement, so long Mr. *Reade* is bound as though he parted to that extent with the copyright in his work, or at all events he would be in this position, either he would, according to *Sweet v. Cator*, have wholly parted with the copyright, so as to be excluded from bringing it out by another publisher, or Mr. *Bentley* would be considered entitled to publish a concurrent series of editions; that may be in some sense a hardship upon Mr. *Reade*: on the other hand, Mr. *Bentley's* counsel have argued, that it might well happen that the sale of the first edition might be

just that which would be necessary to make the work known, but which would not pay its expenses; and if the contract were to be then determined, it might leave *Mr. Bentley* minus a certain quantity of expenses that he has incurred and which he could not be recouped. This agreement expressly refers to the profits of this and all other editions being divided between them; and I think there is a good deal to be said on both sides upon this question.

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 ———
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But as regards the existing edition, it seems to me that *Mr. Reade* cannot interfere with it, for this reason: if I am right in my construction of the agreement, *Mr. Reade* must take steps to dissolve the partnership, if it be a joint adventure, before any expense has been incurred by *Mr. Bentley* in respect to future editions. It may be urged on *Mr. Reade's* behalf, that he did not know of the intended publication of a new edition; but that, according to my construction of the agreement, is not material. *Mr. Bentley* was entitled to go on publishing that or any other subsequent edition until the dissolution of the joint adventure, and was not bound, though he might, as a matter of courtesy, think it right, to make some communication of his intention to *Mr. Reade*. *Mr. Reade* does not allege that the act complained of is fraudulent, but that it is an evasion of the contract and contrary to the spirit and truth of the agreement. *Mr. Reade* says, that his reputation will, in his judgment, be injured by the publication of the proposed cheap edition of his work, but I do not think that it has been proved that this will be the necessary consequence of such a publication. The interim injunction was obtained against *Mr. Bentley* after he had incurred the expense of putting the new edition in type and issuing the advertisements, and I believe before any great expense was incurred, and before many copies were struck off; but I think that *Mr. Bentley* has a right to be recouped the expense that he had incurred, and to have the benefit of all the

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profit, the hope of obtaining which was the cause of his making such expenditure. I am therefore of opinion, that, as regards the present edition, Mr. *Reade* is not in a position to ask the Court to interfere; and accordingly I must discharge the interim order with costs.

The Plaintiff's solicitor in this case certified the value of the property in dispute to be under 1000*l.*, in order to bring the case within the lower scale of charges fixed by the Orders of Jan. 30th, 1857.

The VICE-CHANCELLOR, however, on the point being referred to him, thought that it came within the higher scale, as it was not one of the cases specified by the Orders as subjects of the lower scale.

Feb. 28th.
 & March
 11th.

IN THE MATTER OF THE TRUSTEE RELIEF ACT;
 IN THE MATTER OF THE TRUST OF THE WILL OF
 NICHOLAS BENNETT.

Will—Con-
 struction—
 Vesting—Di-
 rection to pay
 —Deferred
 Bequest.

NICHOLAS BENNETT, by his will, dated in 1817, gave and bequeathed to *Nicholas, Isaac, and Thomas Beard*, the sum of twenty-six hundred pounds 3 per cent. Bank

The use of such words as "pay and transfer" as the only words of gift in a deferred bequest, does not make such bequest contingent: the true criterion is, what was the reason for the postponement. If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent.

A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters *A.* and *B.* for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's children, and the issue, if any, of *A.* and *B.*, and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living (*A.* and *B.* excepted) would have been entitled to. *A.* and *B.* died without leaving issue.

Held, 1. That the bequest in remainder vested at the testator's death. 2. That the whole fund belonged to the testator's children other than *A.* and *B.*, and to the children living at the death of such as had died leaving children. 3. That the shares of such as had died without leaving children belonged to their representatives.

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TRUST.

Statement.

Annuities then standing in his name in the books of the Governor and Company of the Bank of *England*, together with all his moneys and securities for money (subject to the payment of his just debts, funeral and testamentary expenses) "Upon trust, during the natural life of his daughters *Catherine* and *Hesther*, to pay the interest and dividends thereof to his said daughters *Catherine* and *Hesther*, in equal moieties, share and share alike," but without power of anticipation, as therein mentioned. And the will continued: "And in event of the decease of either of them, upon this further trust to pay the whole of the interest and dividends of the said stocks, funds, moneys, and securities for money, to the survivor of them in like manner, and under and subject to the same restriction during her life. And upon the decease of the survivor of them my said daughters, then I direct my said trustees or trustee for the time being to pay, transfer, and deliver all the said stocks, funds, moneys, securities for money, or the proceeds therefrom, equally between and amongst all my children, share and share alike, as tenants in common and not as joint tenants (except my son *John*), and the issue, if any, of my said daughters *Catherine* and *Hesther*, and of any other deceased child except my said son *John*, but so and in such manner that such issue may be entitled to such share or shares in the said trust moneys as his or their deceased parent or parents respectively, if living, (my daughters *Catherine* and *Hester* excepted), would have been entitled to, such share or shares to be divided between the issue of my said daughters *Catherine* and *Hesther*, and of such other respective child, my son *John* excepted, so dying, as tenants in common." And the testator appointed his said daughters *Hesther* and *Catherine* executrixes of his said will.

There were eight children of the testator besides *John*. All eight survived the testator, and one only, named *William*, survived both the tenants for life. The two tenants

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for life died without having been married. Five of the other children, who died in the lifetime of the tenants for life, left issue; the other three died without issue. Some of the deceased's children, also, had children who survived the testator and died in the lifetime of their respective parents.

Argument.
 —

Mr. Daniel, Q. C., Mr. Bevir, Mr. C. Browne, and Mr. C. Hall, appeared for the several parties. The arguments are noticed in the judgment. The cases cited were *Bennett v. Merriman* (a), *Beck v. Burn* (b), *Lyon v. Coward* (c), *Masters v. Scales* (d), *Barker v. Barker* (e), *Hodgson v. Smithson* (f).

Judgment reserved.

Mar. 11th.

VICE-CHANCELLOR SIR W. PAGE WOOD (after reading the will and stating the condition of the family, continued):—

The first question is, whether I am to construe the first gift as vested in the persons entitled in remainder, whoever they may be, or whether it depended upon some contingency which could only be determined at the death of the last tenant for life; and secondly, if it was vested, who were the persons to take.

It was argued, that the whole will so plainly referred to a state of circumstances existing at the death of the last tenant for life that the fund must be held in suspense until that period. But my opinion is, that the true construction

(a) 6 Beav. 360.

(b) 7 Beav. 492.

(c) 15 Sim. 287.

(d) 13 Beav. 60.

(e) 5 De G. & S. 753.

(f) 21 Beav. 354.

is, that the gift vested at once in those entitled in remainder, and was not contingent; and the only thing which I have to consider is, who are the persons entitled. It is clear that the use of the words "pay and transfer," as the only words of gift, does not make such a bequest contingent. The true criterion is that which is mentioned in *Leeming v. Sherratt* (a), namely, whether the postponement of the division or payment was on account of the position of the property, or of the person to whom the deferred interest is given. If the reason is simply, that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death, and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift to one for life, with a vested remainder to the legatees who are to take subject to the life interest. There is nothing in this will to shew that the gift is attached to any personal quality of the legatees, or that the postponement is on account of anything except the estate for life previously given. The limitation is in the usual form in which substitutional interests are given in case of the death of a legatee.

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 Judgment.

The direction that the issue shall take such shares as their respective parents would have been entitled to if living, cannot be relied on to shew that no other persons except those who are living at the death of the surviving tenant for life are to take. The meaning of that provision is, that the testator, having given an interest in remainder to his children, to be divested in favour of the issue of any who may have died before a particular event, uses this expression to shew that the interest given over to the issue of any of his children so dying is not to be more than the share of the parent for whom they are to be substituted.

The gift is, after the death of the surviving tenant for life,

(a) 2 Hare, 14.

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TRUST.

—
Judgment.

equally among all the testator's children, share and share alike, as tenants in common and not as joint tenants, except his son *John*; and as far as that goes, no doubt the words would have included *Catherine* and *Hesther*, and the fund must have been divided into eighths, because it is like the cases of gifts after a life interest to the testator's next of kin, under which the tenant for life takes, if one of the next of kin (a). But the will continues: "And the issue, if any, of my said daughters *Catherine* and *Hesther*, and of any other deceased child except my said son *John*, but so and in such manner that such issue may be entitled to such share or shares in the said trust moneys as his or their deceased parent or parents respectively, if living (my daughters *Catherine* and *Hesther* excepted), would have been entitled to." It has constantly been held, that it is contrary to all sound rules of construction to infer, that it was the intention of the testator to give to the parent stock and the issue together a common interest in a fund; and I think that the words here, directing that the issue should take their parents' shares, notwithstanding that *Catherine* and *Hesther* are excepted, shews that it was the prevailing intention of the testator to substitute children in the room of their deceased parents, but not that parents and their issue shall otherwise take together. I am, therefore, of opinion that I am justified in holding that this was a gift to the six children exclusive of *John*, *Catherine*, and *Hesther*, and by way of substitution to the children of such of them as have died leaving children. It is nothing more than a gift to a class of persons who take vested interests as they come into being; so that, as they were successively born, the class would be augmented. Therefore, at the testator's death, *Catherine* and *Hesther* had a life interest in the fund, with remainder to the survivor of them for life, with remainder to their issue, if any, and to the other six children of

(a) *Bird v. Luckie*, 8 Hare, 301.

the testator, exclusive of *Catherine*, *Hesther*, and *John*, subject to be divested as to the shares of such children by the death of any of them leaving children in favour of their children. As there were no issue of *Catherine* and *Hesther*, the interests of such issue never came in existence, and, therefore, the fund was only divisible in one-sixth shares among the other children, who were liable to have their shares diminished by the birth of issue of *Catherine* or *Hesther*. The share of one of those six children who died without issue, accordingly, belongs to his representatives.

1857.
In re
BENNETT'S
TRUST.
—
Judgment.

With respect to the children of any of those six who died in the lifetime of the tenants for life, I am of opinion that the class who take their parents' shares were the children living at the deaths of their respective parents, although such children of children may have since died in the lifetime of the tenant for life, but that no children of children who pre-deceased their respective parents took any interest. In *Lyon v. Coward*(a) the limitation was to a daughter for life, and then the limitation over was only to such of her children as should be living at her death: and the Vice-Chancellor held, that the limitation was applicable to the issue, and that they took vested interests on the death of their parent. In no case can substituted issue take vested interests during their parents' lifetime. In *Macgregor v. Magregor* (b), a similar view was taken, but the words of the gift there were much stronger, because the limitation over was plainly pointed to children living at a certain period, and the issue of any then dead; and the learned Judge there says, "then comes the question whether the issue of a child then dead must be living when the event happens in order to vest the gift in the issue by substitution;" and he decided that the issue ought to be in the position of their parents. Here the gift is an

(a) 15 Sim. 287.

(b) 2 Col. 192.

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TRUST.

—
Judgment.

absolute gift to the parents, which, on their death, is to be divested in favour of their issue, neither issue nor parents are expressly required to be living at the death of the tenant for life.

March 13th &
28th.

*Will—Condi-
tion precedent
—Return to
England.*

A testator, by a codicil, after reciting that a person to whom he had by his will given a legacy of £2000 had emigrated to *Australia*, proceeded therefore to revoke such legacy, and in lieu thereof gave to the same legatee in case he remained in *Australia* or out of this kingdom, £600 after the death of the testator's wife, "but if he return to *England* before her decease," the testator gave him the further sum of £400.

Held, that the return of the legatee to *England* was a condition precedent, and was not satisfied by his embarkation on board a *British* ship to return to *England*, the ship and passengers being lost on the voyage.

PRIESTLEY v. HOLGATE.

JOSEPH PRIESTLEY, by his will, dated in 1850, gave and bequeathed to *James Priestley* the sum of 19*l.* 19*s.*; and also a further legacy of 2000*l.*

The testator made a codicil dated in 1852, as follows:—
"Whereas, since the making of my will, *James Priestley*, to whom I had bequeathed 2000*l.*, has emigrated to *Australia*, I therefore hereby revoke that legacy, and in lieu thereof I give and bequeath to him the said *James Priestley*, in case he remains in *Australia* or out of this kingdom, 600*l.*, to be paid to him twelve months after the decease of my wife; but if he return to *England* before her decease, I give and bequeath to him the further sum of 400*l.* (making 1000*l.*). This last 400*l.* not to be paid till twelve months after the decease of my wife."

In November, 1852, the testator died. *Sarah Priestley*, his widow, died in January, 1856.

At the time of the decease of the testator, *James Priestley* was at *Melbourne*, in *Australia*, whither he had gone in the year 1852.

On the 9th day of August, 1853, he sailed in a *British* ship named the *Madagascar* from *Melbourne* on the home-

ward voyage to *England*, and upon the voyage the *Madagascar* was totally lost, and all her crew and passengers perished at sea.

1857.
PRIESTLEY
v.
HOLGATE.
Statement.

The Plaintiff was his administratrix, and filed the bill in this suit to recover the said legacies of 19*l.* 19*s.* and 600*l.* and 400*l.*

Mr. *Prendergast*, for the Plaintiff, argued that there had been a substantial performance of the condition on which the legacy of 400*l.* was given to *James Priestley* by the codicil, by his embarking in a *British* ship with the purpose of returning to *England*. He cited *Tanner v. Tebutt* (a), *Burgess v. Robinson* (b), *Sprigg v. Sprigg* (c).

Argument.

Mr. *Cairns*, Q. C., and Mr. *Fischer*, for the Defendants, argued that the condition was precedent to the gift of the 400*l.*, and must, therefore, be literally performed before the legacy could take effect, citing *Egerton v. Lord Brownlow* (d), *Stapleton v. Cheales* (e).

Mr. *Prendergast* replied.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

March 26th.

I delayed giving my judgment in this case, in the hope of finding something to enable me to decide in favour of the Plaintiff's claim to the additional legacy of 400*l.* (His

Judgment.

(a) 2 Y. & C. C. 225.

(d) 1 Sim. N. S. 464.

(b) 3 Mer. 7.

(e) Prec. in Ch. 317.

(c) 2 Vern. 394.

1857.
PRIESTLEY
v.
HOLGATE.
—
Judgment.

Honour stated the effect of the will and codicil and continued)—At the time of making this codicil, *James Priestley* was in *Australia*. It is proved that he embarked to return to *England*, but the ship in which he sailed foundered at sea and all on board perished. The condition on which the legacy was given is personal to the legatee, and the legacy cannot take effect unless that inchoate return fulfils the terms of the condition. I was desirous to adopt that construction, if possible; but I do not think that the words of the condition, which are very precise, "if he return to *England* before her decease," can be satisfied by his embarking on a voyage to this country, in which he perished at sea.

If the codicil had contained a recital, that, owing to the testator's displeasure with *James Priestley* on account of his departure to *Australia*, he attached this condition to the legacy as a penalty, possibly the inchoate return might have satisfied the condition; but it may be, that the reason for the condition was, that the testator thought, that, while away from *England*, *James Priestley* did not require so large a provision as he would if residing in this country. I must, therefore, decide against the Plaintiff's claim as to the 400*l*.

1857.

RICKARD v. BARRETT.

March 24th.

WILLIAM RICKARD, by his will, in 1854, gave to each of his daughters, *Catherine* and *Anna*, 19 guineas, and to his daughter *Elizabeth* 118*l.* 19*s.*; after which he proceeded to devise as follows:—"All the rest, residue, and remainder of my personal estate, and all my real estate of every sort and description which I may die possessed of or interested in, with their and every of their appurtenances, *subject nevertheless to the payment of my just debts*, and my funeral and testamentary expenses, I give, devise, and bequeath unto my dear wife *Joanna Rickard*, her heirs, executors, administrators*, and assigns, for all the estate and interest I may have therein respectively at the time of my decease, to and for her and their own absolute use and benefit during her natural life*," with remainders over; and the testator appointed his wife sole executrix of his will.

The creditors having been paid out of the personal estate, which was not sufficient to pay both them and the legatees, the question was, whether the latter were entitled, on the principle of marshalling, to have recourse for payment to the real estate to the prejudice of the devisees.

Mr. *Bagshawe*, jun., for the legatees, contended, that they were so entitled, citing *Foster v. Cook* (a), *Surtees v. Parkin* (b), *Paterson v. Scott* (c), and 2 *Jarman* on Wills, pp. 572, 573.

to entitle the legatees to come upon the real estate so far as the personalty has been applied in payment of debts.

Will—Administration of Assets—Marshalling—Charge of Debts—3 & 4 Will. 4, c. 104.

The Act 3 & 4 Will. 4, c. 104, has not affected the law as to the marshalling of assets in favour of pecuniary legatees against devisees of real estate charged with, or devised subject to, the testator's debts. The question now, as before the Act, is one simply of intention on the whole of the will; and a mere charge of debts upon the real estate, or a mere devise of the real estate subject to testator's debts, without any trust, is sufficient, in the event of the personal estate proving inadequate to pay both debts and legacies,

* *Sic.* (a) 3 Bro. C. C. 347. (b) 19 Beav. 406. (c) 1 De G., M'N. & G. 531.

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 RICKARD
 v.
 BARRETT.
 Argument.

Mr. *Greene*, for the devisees, some of whom were infants:—

In all the cases cited, with the exception of *Foster v. Cook*, there was an express trust for payment of debts. In *Surtees v. Parkin* (notwithstanding the marginal note), and in *Paterson v. Scott*, the lands were devised to trustees, upon an express trust for payment of debts; and it was upon that circumstance, in each of those cases, and not merely upon the words "subject to the payment of debts," that the decision turned.

Then, as to *Foster v. Cook*, it is true, that there it was merely a charge of debts upon the real estate, and not an express trust; but that case was decided before the recent Act (3 & 4 Will. 4, c. 104), by which real estate not charged with, or devised subject to, the testator's debts, is made assets for payment of such debts. Since that Act came into operation a charge of debts, or a devise subject to debts, is for this purpose inoperative,—the charge being effected by the law itself, irrespective of the will,—and cannot affect the position of the parties in reference to a question of marshalling, any more than the like direction in reference to leaseholds can prevent the operation of the Statute of Limitations: *Scott v. Jones*(a); the principle of which decision was, that a declaration in express terms, that an estate shall be subject to the payment of debts when the law makes it subject to such payment irrespective of such declaration, is simply inoperative. *Foster v. Cook*, therefore, is no longer an authority on this subject.

A reply was not heard.

(a) 4 Cl. & F. 362, 397.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It is clear to me that the law as laid down on this subject in *Foster v. Cook*, is not affected by the recent statute 3 & 4 Will. 4, c. 104. The question since the passing of that Act, as formerly, is simply this: What was the intention of the testator, judging from the whole of the will? Here, the testator's words are, "all the rest, residue, and remainder of all my personal estate, and all my real estate of every sort and description which I may die possessed of or interested in, with their and every of their appurtenances, *subject nevertheless to the payment of my just debts*, and my funeral and testamentary expenses, I give, devise, and bequeath unto my dear wife." Therefore, he clearly charges all his real estate before it reaches the hands of his wife. The Act does not affect the principle upon which this Court decided the cases before it came into operation.

The plain intention here is, that the property shall not pass to the devisees until the debts are paid; and I must therefore hold, that, the personal estate proving insufficient to pay both debts and legacies, it is a case for marshalling, and the legatees are entitled to come upon the real estate, so far as the personal estate has been applied in payment of debts.

1857.
RICKARD
v.
BARRETT.
Judgment.

1857.

April 29th.

SLEIGHT v. LAWSON.

Trust and
Trustee—Exec-
utors—Ad-
ministration—
Wilful Neglect
and Default
—Pleading—
Practice—Ac-
counts—Inqui-
ry—15 & 16
Vict. c.86, s.54.

Lord Eldon's
rule, that, in
order to ob-
tain an inquiry
as to wilful
neglect and
default against
an executor or
a trustee, the
Plaintiff must
allege and
prove at least
one act of wil-
ful neglect or
default, is still
the rule of this
Court, and was
not intended
to be relaxed
by *Coope v.
Carter* (2 De
G., M'N. & G.
297, 298).

PURCHAS LUMLEY made his will in 1824, and ap-
pointed *Williams*, since deceased, the Defendant *Lawson*,
and others, executors and trustees.

The testator died in 1825. His will was proved in *Ja-
maica*, by *Williams* and the Defendant *Lawson* alone.

Williams died in 1836, and the Defendant *Grant* was
his executor.

The will of the testator never having been proved in
England, letters of administration of his personal estate
and effects with the will annexed were granted out of the
Prerogative Court of *Canterbury*, in 1855, to the Plaintiff,
who now filed his bill against *Lawson*, *Grant*, and others,
charging, that, shortly after the testator's death, *Williams*
and *Lawson*, or one of them, caused an inventory and
appraisement to be made of all and singular the goods and
chattels, rights and credits, of the testator; that it appeared
from such inventory and appraisement that the same were

Dicta in that case, from which the contrary has been inferred, explained.

Shortly after a testator's death, in 1825, an inventory and appraisement was made by his
executors, or one of them, of all and singular the goods and chattels, rights, and credits of
the testator, shewing that the same were of the value of 28,665*l.* odd. Upon bill filed in
1856 for an account, and for an inquiry as to wilful neglect and default, in case the estimat-
ed amount had not been realised, the Defendants failed, as to a large portion of the estimated
amount, to shew that it had been realised:—*Held*, nevertheless, that the Plaintiff was not
entitled, at the hearing, either to an inquiry expressly directed to wilful neglect or default,
or even to a preliminary order of the kind indicated in *Coope v. Carter*, viz. an inquiry short
of wilful neglect and default, but upon which a new order, expressly so directed, might be
founded at a future stage: the Court being of opinion, first, that, upon the pleadings, the
fact of wilful neglect and default could not be treated as in issue between the parties; and,
secondly, that, even if it could be so treated, there was no evidence upon it.

Accounts, recorded in the Court of Chancery in *Jamaica* in a suit instituted against exe-
cutors who had proved testator's will in that island, ordered, in a suit against them in *Eng-
land*, to be taken, under 15 & 16 Vict. c. 86, s. 54, as *prima facie* evidence of the truth of
the matters therein contained; with liberty to the Plaintiff to surcharge and falsify.

of the value of 28,665*l.* 18*s.* 2½*d.* *Jamaica* currency; that such goods, chattels, credits, and assets were worth that sum at least, and that the whole thereof were realised by *Williams* and *Lawson*, and produced more than sufficient for payment of the testator's funeral and testamentary expenses and debts; and that the whole amount realised therefrom was not applied in payment of the testator's funeral and testamentary expenses and debts.

1857.
SLEIGHT
v.
LAWSON.
Statement.

The bill contained a further charge, that, if the particulars of the personal estate of the testator mentioned in the said inventory and appraisement, or any of them, were not realised by *Lawson* and *Williams*, then *Lawson* and *Williams* were guilty of wilful neglect or default in not realising the same, and that they ought to be charged with any loss occasioned, as well as with interest, on any balances which might appear to have been retained by them or either of them in their or his hands.

The bill prayed, that the testator's personal estate and effects might be administered under the decree of the Court, and for an account of all the personal estate and effects of the testator received by the Defendant *Lawson*, and *Williams*, deceased, or which, but for their or either of their wilful neglect or default, might have been received, and of the application thereof, and of the outstanding personal estate of the testator.

The Defendants, by their answer, admitted the charge as to the making of the inventory and appraisement; and that it appeared by such inventory, that the goods and chattels, rights and credits, of the testator were of the value of 28,665*l.* odd, as charged in the bill. But of that sum they said, that 20,800*l.* had been expended in paying off charges on the testator's estates; and, as to the balance, they said that, save as appeared by their accounts, which were pro-

1857.
 SLEIGHT
 v.
 LAWSON.

Statement.

duced, they were unable to set forth whether the same had been realised, or how the amount realised had been expended.

As to a considerable part of the balance, the accounts failed to shew whether it had been realised.

The Defendants further, by their answer, insisted, that a suit for the administration of the testator's personal estate had been instituted against the Defendant *Grant* in the Court of Chancery in *Jamaica*; that, by the decree in such suit, an account was directed of the testator's personal estate received by the Defendant *Grant*; and that such accounts had been taken and recorded.

The Defendants did not, by their answer, set up the Statute of Limitations as a bar to the relief prayed.

Argument.

Mr. *Daniel*, Q. C., and Mr. *Faber*, for the Plaintiff:—

The Defendants, having admitted the charge as to the inventory representing the assets as amounting to 28,665*l.* 18*s.* 2½*d.*, were bound to shew whether the whole of that sum was actually realised. This they have not done. And the Court, therefore, will direct an inquiry "of what personal estate the testator was possessed at the time of his death; and if it should appear that the same, or any part thereof, was not got in or received, then why and under what circumstances the same was not got in or received."

The circumstances of the present case are precisely those indicated by Lord Justice *Knight Bruce* in *Coope v. Carter* (a), where, admitting Lord *Eldon's* general rule, viz. that, in order to obtain an inquiry as to wilful default against an

(a) 2 De G., M. & G. 297, 298.

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SLIGHT
v.
LAWSON.
—
Argument.

executor or trustee, the Plaintiff must allege a case for such an inquiry, must pray for it, and prove one act at least of wilful default, he adds, "this state of circumstances may, however, arise: a case of wilful default may be alleged, and a prayer may be founded on it; but the circumstances appearing by admission or proof *may only raise a case of suspicion in the mind of the Court* on the question whether an act of wilful default has been committed. In such a case, I can conceive that the Court, if it is likely that further evidence may be obtained, ought to direct an inquiry *short of directing wilful default, in order to ground upon that a new order, and to direct an inquiry as to wilful default at a future stage.*" This preliminary inquiry, he adds, should be directed in such a way as to call the Defendant's attention to the facts to be investigated; and by the inquiry we seek that is done.

Mr. Rolt, Q. C., and Mr. Mackeson, for the Defendant Lawson; and

Mr. Goldsmith, for the Defendant Grant, relied upon lapse of time as a general objection to any account at all. At all events, there could be no inquiry as to wilful neglect and default, no single instance being proved, or even positively averred; and the inquiry sought by the Plaintiff, although disguised under another name, was, in effect, an inquiry as to wilful neglect and default.

At this distance of time, after a lapse of thirty-two years, the accounts, having been regularly kept, are *prima facie* evidence, and shift the onus upon the Plaintiff: *Chalmer v. Bradley (a)*.

They cited also *Parker v. Bloxam (b)*.

(a) 1 J. & W. 65.

(b) 20 Beav. 295.

1857.

SLIGHT

v.

LAWSON.

Argument.

Mr. Willcock, Q. C., and Mr. Oliver, for other parties.

The VICE-CHANCELLOR said, there must be an account; and limited the reply to the questions, whether the accounts recorded in *Jamaica* should not be received as *prima facie* evidence under the 15 & 16 Vict. c. 86, s. 54; and whether there should be any inquiry as to wilful neglect or default, the Plaintiff not having proved or averred any specific instance of that nature.

Mr. Daniel, Q. C., in reply:—

There is evidence that there was personal estate of the amount charged, and there is not evidence that all was got in. If any was not got in, there is no evidence why it was not so got in, and that throws the onus on the Defendant. It may be, that the Plaintiff is not, at this stage of the suit, entitled to an inquiry expressly directed to wilful neglect and default, but he is at least entitled to a preliminary inquiry, such as that indicated by Lord Justice *Knight Bruce* in *Coope v. Carter*. If the whole amount has been realised by the Defendants, it will appear by their accounts; if it has not, then the inquiry sought will bring out why it has not been received.

• Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In regard to the Defendant *Lawson*, the surviving executor and trustee under the will, it is true that this is a very old trust; but he has not thought fit to insist on the Statute of Limitations by his answer, and he is therefore precluded from relying on that statute as a bar to the account sought.

In regard to the Defendant *Grant*, he says, that an account was decreed against him by the Court of Chancery in *Jamaica*, under which certain statements of account

were filed; and looking to the 54th section of the late Act, the stat. 15 & 16 Vict. c. 86, which enacts, that it shall be lawful for the Court, in any case where an inquiry is required to be taken, to give such special directions (if any) as it may think fit, with respect to the mode in which the account shall be taken or vouched, I find these words added, "And particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that, in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." I think that is sufficient to authorise me to direct, that, in taking the accounts in this suit, accounts proved to have been recorded in the Court of Chancery in *Jamaica* shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the Plaintiff to surcharge and falsify.

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Then, as regards the question, whether the Plaintiff is entitled to an inquiry as to wilful neglect and default, or rather to a preliminary inquiry of the nature indicated in *Coope v. Carter*, I am satisfied that Lord Justice *Knight Bruce* never intended, by any observation in that case, to say, that, whereas the rule of the Court had always previously been, that the Plaintiff must aver and prove at least one act of wilful neglect or default in order to obtain a decree directing an inquiry as to wilful neglect or default, that rule was thenceforward to be enlarged, so that wherever there is an admission by executors or trustees of certain debts having been due to the testator at the time of his decease, unless they can prove, at the hearing of the cause, that the whole amount of these debts has been received in the lump, the Plaintiff is to have such an inquiry as that indicated in *Coope v. Carter*. To lay down such a rule,

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would be to abandon the plain principle established by Lord *Eldon*, and always acted upon by the Court from his time to the present, and would end in nothing short of this, that wherever an executor admits debts to have been owing to his testator at the time of his death, any party competent to file a bill for administration of the testator's estate may say, "If you have received those debts, well and good. If not, shew me at once now before the hearing what you have been doing, and why you have not received them."

Here, the Defendants admit that the inventory and appraisement was made, and shewed the goods and chattels, rights and credits of the testator, to have amounted to upwards of 28,000*l*. "Of that sum, 20,800*l*," they say, "was expended in paying off charges on the testator's estates; and as to the rest, we cannot answer, except as appears by our accounts, whether it was realised or not." Then, the accounts being in Court, the Plaintiff's contention is, that the Court is to pick out the items not shewn by the accounts to have been realised, and upon those items is to found an inquiry as to wilful neglect and default.

The plain course is that laid down by Lord *Eldon*: It is for the Plaintiff to fix on any item he pleases, and adduce proper evidence to shew, that, but for the wilful neglect or default of the Defendant, it might have been received. Had the Plaintiff followed that course in the present case, and had the evidence on the point been conflicting, the Court upon that, as upon any other doubtful point arising from a conflict of evidence, would have directed an inquiry. And that is all that was intended by Lord Justice *Knight Bruce* in the passage cited from *Coope v. Carter*, as is clear from the instance he gives in illustration. Immediately after the passage in question, he says this: "For instance, if the allegation be that a sum of 1000*l*. has been lost by wilful default, the inquiry may well be, under what circumstances

it was lost, and into the facts bearing on the loss. Then the evidence will be supplied; and when it comes back to the Court, an inquiry as to wilful default may be directed" (a). In other words, you may raise your contest upon any items or item you choose to fix upon as a specific instance of wilful neglect or default; and if you make out a case of suspicion in the mind of the Court,—if it remains doubtful whether wilful neglect and default have not been committed, then you may have the inquiry in question. But it is clear that it was never intended, by anything in that passage, to alter the law of the Court on this subject as laid down by Lord *Eldon*.

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In the present case, I cannot direct the inquiry sought as to wilful neglect and default, inasmuch as it appears to me, first, that, upon the pleadings, the fact of wilful neglect or default cannot be treated as in issue between the parties; and, secondly, because, even if it could be treated as in issue, there is no evidence upon it.

I must therefore dismiss the bill as to wilful neglect or default; but as no evidence has been adduced in reference to that question, it will not be dismissed with costs.

Decree accordingly.

(a) 2 De G., M'N. & G. 298.

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IN RE RAWBONE'S BEQUEST.

March 25th &
27th.

*Bankruptcy—
Order and Dis-
position—Re-
versionary In-
terest—Legacy
—Chose in
Action—No-
tice.*

*Case on
p. 476.*
A bankrupt's
reversionary
interest in a
legacy, not
falling into
possession un-
til after his
bankruptcy,
is exempt from
the rule as to
order and dis-
position.

Notice of an
assignment of
a chose in ac-
tion, although
derived ali-
unde, and not
from assignor
or assignee, is
sufficient to
give priority:
semble.

CHARLES BERTIE RAWBONE, deceased, by his will, in 1825, bequeathed all his property to his wife *Cecilia*, during her widowhood, and, after her decease or second marriage, to his two children, *John Edward* and *Cecilia Mary* (since deceased), in equal shares, or to such one of them as should survive him; and he appointed his wife and one *Southby* executrix and executor of his will.

The testator died in May, 1828.

In 1841, *John Edward*, being then in prison for debt, filed a petition in the Court for the Relief of Insolvent Debtors, for his discharge from custody under the Acts then in force for the relief of insolvent debtors; and by an order of that Court, dated the 28th of July, 1841, all the estate and effects, which should come to him before he should become entitled to his final discharge in pursuance of the said Acts, according to the adjudication made in that behalf, were vested in the Petitioner, the provisional assignee of the Court, in trust for the creditors of the insolvent. No creditors' assignee was appointed. By an order dated the 22nd of May, 1842, the insolvent was adjudged entitled to the benefit of the said Acts.

In August, 1854, *John Edward* became a bankrupt.

In January, 1856, *Cecilia*, the tenant for life, died. She had not married again.

The residue of the testator's personal estate having been paid into Court by *Southby*, as the surviving executor, a

petition was now presented by the assignee under *John Edward Rawbone's* insolvency, for a transfer of the moiety, to which the latter was entitled in his own right, of the fund in Court.

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It appeared, that, previously to the transfer into Court, but subsequently to the vesting order of July, 1841, *Southby* had paid to *John Edward*, out of the testator's residuary personal estate, the sum of 103*l.* on account of his share and interest under the will.

Mr. *Osborne*, for the Petitioner, contended, that he was entitled: first, because the executors must have had notice of his claim before the bankruptcy, and, for this purpose, notice aliunde would have been sufficient; and, secondly, because, even if the executors had never had such notice, the interest of the bankrupt at the time of the bankruptcy being still reversionary,—the tenant for life being still alive,—was exempt from the rule as to order and disposition.

Argument.

Mr. *Cracknall*, for the Respondents, the official and trade assignees in bankruptcy:—

At the time of the bankruptcy the property was in the order and disposition of the bankrupt, and therefore passed to the Respondents as his assignees in bankruptcy. The assignee in insolvency has not shewn that he gave any notice to the executors.

He cited *Tucker v. Hernaman*(a), *Butler v. Hobson*(b), *Loveridge v. Cooper*(c), *Re Atkinson*(d), *Re Birch's Legacy*(e).

(a) 4 De G., M'N. & G. 395.

(b) 5 Bing. N. C. 128.

(c) 3 Russ. 34, 41.

(d) 2 De G., M'N. & G. 140.

(e) 2 K. & J. 328.

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Mr. *Osborne* replied.

Judgment reserved.

*March 27th.**Judgment.*

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is, whether the reversionary interest of a bankrupt in a legacy, which did not fall into possession until after his bankruptcy, is to be considered as having been, at the time of the bankruptcy, in his order and disposition, so as to frustrate the title of the assignee under a previous insolvency.

The testator, by his will, in 1825, bequeathed all his property to his wife during her widowhood, and, after her decease or second marriage, to his son and daughter, in equal shares. The daughter died intestate. The son became successively insolvent and a bankrupt, and the important question to be tried arises on the son's share, which, at the time of his bankruptcy, and down to the 20th of January, 1856, continued a reversionary interest, the tenant for life being still alive.

I have not been able to find any case which has arisen on this question. It was adverted to in *Ex parte Newton* (a), where the party, who eventually became bankrupt, had previously taken assignments of certain reversionary interests under a will, and deposited the deeds of assignment by way of equitable mortgage; no notice was given to the executors and trustees, either of the assignments or of the mortgage; and, upon the party becoming bankrupt, it was contended on behalf of his assignees in bankruptcy, that, in the absence of such notice, he must be taken to have had the order and disposition of the property at the time of the bankruptcy.

(a) 4 Deac. & Chit. 138, 140.

The contrary however was held, first, because the bankrupt had not given the trustees any notice of the original assignment to himself; and, secondly, because the deeds were not in his hands, but were deposited by him for a valuable consideration with the mortgagee, so that the bankrupt could not have availed himself of the assignments without gross fraud.

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It is true, that, in that case, one of the learned Judges observed, that there might be a question whether a *reversionary* interest came within the clause of order and disposition, adding, "A policy of assurance on a life certainly does; and therefore, perhaps, on the same principle, all reversionary interests may be likewise held to come within it." But, for the reasons I have stated, he concurred in holding, that, in that case, the property was not in the order and disposition of the bankrupt at the time of his bankruptcy.

That is the nearest approach I have found to the case before me. I find no case raising the simple question, whether the interest of a bankrupt, which, at the time of the bankruptcy, is still reversionary, and does not fall into possession until afterwards, comes within the clause as to order and disposition. None of the cases cited shew that it does; and finding no authority which has gone that length, and feeling, as other Judges have felt, that the cases have already gone far enough as to the doctrine of reputed ownership, where no notice has been given of the assignment of a chose in action, I am not disposed to carry the rule further.

The bankrupt in this case could, in no way, have made himself master of the fund in question until the death of the tenant for life, and, that event not having taken place at the time of the bankruptcy, the fund could not be in his order and disposition. He might, indeed, have assigned the fund; but it cannot, I think, be said that the fund in the hands of

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the trustees was in the order and disposition of the bankrupt.

A further point was raised by Mr. *Osborne* on behalf of the Petitioner, but it was one on which I should not have felt it right to decide the question without further inquiry. He argued, that the trustees must in fact have had notice either from the parties themselves or aliunde. Now, although it is true that no notice appears to have been given by the insolvent or by his assignee, still I should think, that if the trustees had notice aliunde, it would be equally impossible for them to part with the fund.

Mr. *Osborne*.—That has been so held. *Jones v. Smith*(a) shews that it is immaterial from what source the notice is derived.

The VICE-CHANCELLOR.—I should think that must be the rule. However, I was about to say, that I cannot rely on that, because the trustees appear to have made, since the vesting order under the insolvency, a payment to the insolvent on account of his share and interest under the will, which raises a presumption that they had no notice of his insolvency. I have, therefore, considered myself bound to try the question on the simple ground of the interest being reversionary at the time when the bankruptcy occurred.

The distinction between a policy of assurance and a reversionary interest like that now in question, appears to me to be this: that a policy of assurance is a present contract—an interest vested in the party, and of which he has a present right to the benefit—whereas here the bankrupt had no interest whatever to the fund until the death of the tenant for life. And, although it is true that he could assign, still I do not think that is sufficient.

(a) 1 Hare, 43. See *Smith v. Smith*, 2 Cr. & M., 231.

Not finding any authority for holding this reversionary interest to have been in the order and disposition of the bankrupt, I must decide in favour of the title of the assignee under the insolvency.

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DECLARE, that, as to one moiety of the fund to which the bankrupt *John Edward Rawbone* was entitled in his own right, the Petitioner is entitled, and pay the same to the Petitioner accordingly. Let the rest of the petition stand over.

Minute of
Order.

EYRE v. MONRO.

April 30th,
May 6th.

BY an indenture of settlement, made previously to the marriage of *Theodore Monro*, deceased, and *Emma* his wife, reciting (inter alia), that, upon the treaty for the marriage, and for the purpose of providing and securing for *Theodore* and *Emma*, and the issue of their marriage, a further and additional income, to continue during the joint lives of both or either of them; and also such further and permanent provisions as thereafter mentioned, the parties there to had agreed to enter into such several covenants with the trustees as thereafter contained: It was (inter alia) witnessed, that, in the event of *Theodore's* death in the lifetime of *Edward Monro* his father, and leaving issue living at his decease, (which event happened), he the said *Edward Monro* should, in and by his last will and testament, or by some codicil or codicils thereto or otherwise, in his lifetime, in due form of law, well and effectually give, devise, and bequeath, or otherwise settle and assure, by and out of and to be charged upon and issuing from all such messuages, lands, tenements, and hereditaments, whether freehold or

Settlement—
Covenant—
Breach—As-
sets—Specialty
Debt.

Covenant by a father in his son's marriage settlement, by will or otherwise, in his lifetime, to settle 3000*l.*, to be charged upon all real and personal property of which he should at or immediately before his death be seized or possessed, so as, immediately after the decease of the survivor of himself and wife, to become well and effectually vested in the

trustees of the settlement, upon trust for the son's widow and the issue of the marriage:—
Held, to create a specialty debt, to be proved accordingly in the administration of the father's estate.

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 —
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copyhold, or customary, or leasehold, and all such goods and chattels, and other real and personal property, estate, and effects whatsoever and wheresoever, or of what nature or kind soever, as he should or might, at or immediately before the time of his decease, be seised or possessed of or entitled to, either at law or in equity, and whether in possession, reversion, remainder, or expectancy, or otherwise howsoever, (subject to his wife's life estate), the full and clear sum of 3000*l.* of lawful money of *Great Britain*, or property to or of the full and clear and unquestionable amount or value of that sum, so and in such manner as that the same should, immediately upon and from and after the decease of the survivor of *Edward* and *Sarah* his wife, be and become well and effectually vested in the trustees or trustee for the time being, upon certain trusts, for *Emma* and the issue of the marriage.

Edward Monro, by his will, devised and bequeathed all his residuary real and personal estate upon trust to pay (among other sums) 3000*l.*, in satisfaction of the covenant contained in the settlement.

The testator died indebted upon a judgment, and also to several simple contract creditors. His assets were sufficient for payment of the 3000*l.* in addition to the judgment debt; but, in the event of such payment being made in priority to the simple contract creditors, there would be nothing left for any of the latter.

Argument.
 —

Mr. *Rolt*, Q. C., for the simple contract creditors, contended, that the 3000*l.* must be postponed to the simple contract debts. The covenant was merely to pay that sum *out of the testamentary estate*, and amounted, at the highest, to no more than this: "I will not *give my property by will* to any one in preference to you." During his life, the testator

was to have the entire control over it, and might, by gift inter vivos, have disposed of the whole to another child.

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Argument.

Mr. *Willcock*, Q. C., and Mr. *G. L. Russell*, for the trustees of the settlement:—

The 3000*l.* is a charge upon the whole of the testator's real and personal estate, in preference to all creditors, except such as have specific charges.

At all events, it is a specialty debt, and has priority to all debts due on simple contract. This is a covenant for valuable consideration—the marriage of a son.

The question is one of intention. The object of the covenant was provision for marriage, and the question is, whether what has been done is to be mere waste paper. The words of the covenant are express, and as strong as they can be, that the father will *do* this, not that he will merely *profess* to do it.

They cited *Wellesley v. Wellesley* (a), *Logan v. Wienholt* (b), and *Jones v. How* (c).

Mr. *Rolt*, Q. C., in reply.

The VICE-CHANCELLOR reserved judgment, observing, that, in *Logan v. Wienholt*, as well as in all the other authorities with which he was acquainted upon this subject, the question arose not between parties claiming as creditors, but between different objects of the testator's bounty.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

May 6th.
Judgment.

The question in this case is very short, and arises on the

(a) 4 My. & Cr. 561. (b) 1 Cl. & F. 611, 630. (c) 7 Hare, 267.

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ETHE
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MONRO.
Judgment.

words of a covenant by a Dr. *Monro*, contained in the settlement made on the marriage of his son.

[His Honour read the covenant.]

Upon this covenant, the meaning of which seems almost obliterated in the cloud of words which the draftsman has thought fit to employ, the short question is, whether the father intended to say: "I will settle on you this 3000*l*. by deed or will, guaranteeing it by my will, if by will I settle it;" or whether his meaning was, "I will settle it by deed; or I will settle it, so far as my testamentary estate shall extend, by my will."

I think, looking at the whole intention of the covenant and the object of the settlement, that the father's meaning must be taken to have been, that the full sum mentioned should be effectually vested in the trustees—not 'I will *purport* to do it by my will, but when you come to examine my assets, you will not receive anything:' but 'I *will* do it;'—and that he intended to create a present debt, to be proved as a specialty debt in the event of his death without having discharged it in his lifetime.

It is to be regretted that the draftsman should have employed such a mass of words, when his object could have been effected by the usual simple covenant, that the father would pay the money during his life, or that his executors should pay it after his decease. But the mere circumstance of his not having adopted that simple form, is not a ground for holding that the covenant he has inserted would be fulfilled by the covenantor merely purporting to perform it, or by anything short of effectually performing it. And it cannot be effectually performed if the debts swallow up all the available assets.

It appears therefore to me, that the breach of the covenant lets in the trustee to prove as a specialty creditor.

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 Judgment.

It is true, that, notwithstanding the covenant, the father might have disposed of the whole of his property in his lifetime, provided such disposition were not made in fraud of or for the purpose of defeating his covenant, as it was in *Jones v. Martin* (a), which was referred to in the case before the House of Lords (b). But the question is, whether, he not having so disposed of his property in his lifetime, his will is or is not to be construed so as to render the property of which he has not disposed available for the performance of his covenant.

The answer to the other creditors is, that the very act they are doing, occasions the breach of covenant.

There must be a declaration that this 3000*l.* is a specialty debt, and is to be proved accordingly.

(a) 3 Anst. 882, more fully reported in 5 Ves. 266, n.

(b) *Logan v. Wienholt*, 1 Cl. & F. 630.

1857.

May 6th &
8th.

*Property Qualification—
Fraud on Law
—Resulting
Trust—Parol
Evidence.*

The statutes relating to the *Bedford Level* require, that a person to be eligible as governor or bailiff should have at least 400 acres of land within the *Level*.—*Held*, that this must mean, he must have the *beneficial* interest in so much land, because the governors and bailiffs have large powers and public duties, which it could not be intended that a pauper might exercise.

A father conveyed, by a registered deed, 900 acres of land in the *Bedford Level* to his son, in order to make him eligible as a bailiff. The son died shortly afterwards, without being aware of the conveyance, and without having been elected a bailiff.—*Held*, that the father could not recall the gift, but that the heir of the son was entitled to it for his own benefit.

The deed itself not disclosing the motive for the gift, but being simply a conveyance to the son in consideration of affection and a nominal money payment.—*Held*, that a plea of the Statute of Frauds would prevent the admission of parol evidence to raise a resulting trust.

CHILDERS v. CHILDERS.

BY the statute 15 Car. 2, c. 17, intituled "An Act for settling the Great Level of the Fens, called *Bedford Level*," certain persons were incorporated by the name of "The Governors, Bailiffs, and Commonalty of the Company of Conservators of the Great Level of the Fens." To the corporation so constituted, large powers were given for draining and managing a tract of land, containing 95,000 acres; and for the continuance of the corporation in succession for ever, it was enacted, that the said governors, bailiffs, conservators, and commonalty should, yearly, elect a new governor, bailiffs, and conservators; and it was provided, that none should be capable to be or continue governor or bailiffs that had not 400 acres or more of the said 95,000 acres.

The Plaintiff in this suit, being the owner of a large estate in the *Bedford Level*, and having been for many years an officer of the corporation, desired that his son *Rowland Francis Walbanke Childers*, since deceased, should become one of the bailiffs of the corporation. The son had not the necessary qualification of 400 acres of land, but the Plaintiff, without communicating his intention to his son, wrote to the Registrar of the corporation on the 10th of October, 1855: "I am desirous of giving my son a qualification for the *Bedford Level* Board. His name is *Rowland Francis Walbanke Childers*. I presume there will be no difficulty

in doing it. I think it had better be a bailiff's qualification; I think you will perhaps find some old qualification for Mr. *Roberts* and Mr. *Maxwell Edmonds*; but I do not know that they will be of any use to you, as they were only conservators."

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The Registrar accordingly prepared, and forwarded to the Plaintiff, an indenture, which, when executed, bore date the 19th day of October, 1855, and was made between the Plaintiff, of the one part; and the said *Rowland Francis Walbanke Childers*, of the other part: and it was thereby witnessed, that the Plaintiff, in consideration of the natural affection which he bore towards his son the said *Rowland Francis Walbanke Childers*, and of 20s. to him paid by the said *Rowland Francis Walbanke Childers*, did thereby grant, bargain, sell, and convey unto the said *Rowland Francis Walbanke Childers*, all those 932 acres (be the same more or less) of land, taxable by the *Bedford Level* corporation, being part of 12,000 acres of land described in the lot book of the said corporation, numbered 22, part of the King's 12,000 acres, *Eastrea* common, together with the appurtenances, to hold the same unto and to the use of the said *Rowland Francis Walbanke Childers*, his heirs and assigns, for ever.

Rowland Francis Walbanke Childers was, at that time, residing abroad, and the deed was executed by the Plaintiff without his knowledge, and on the 20th of October, 1855, was entered with the Registrar, in pursuance of the Act of Parliament; and the entry thereof was indorsed upon the said indenture by the Registrar, who immediately returned the same to the Plaintiff. The son did not afterwards return to *England*, but died abroad intestate, leaving the Defendant his heiress at law, an infant.

The Plaintiff now filed this bill, stating, that he did not intend, by executing the said indenture, thereupon to convey the beneficial interest in the lands therein comprised to

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 —
Statement.

his son the said *Rowland Francis Walbanke Childers*; but that he executed the said indenture under the apprehension that he should convey the legal ownership and retain the beneficial enjoyment, it not being necessary for a qualification that the legal owner should also possess the beneficial enjoyment; and the Plaintiff intended, on the return of his said son to *England*, to arrange with him, on handing over to him the said deed, that he the Plaintiff should so continue in the beneficial enjoyment, and that he had accordingly remained ever since in possession of the lands comprised in the said indenture; and praying that it might be declared, that the deed was intended to convey only a dry legal estate as a qualification, and no beneficial interest, and was made for a particular purpose, which never took and never can take effect; and that, therefore, the trust and beneficial interest thereof ought to be deemed in this Court to have remained in the Plaintiff for his own absolute use and benefit; and that it might be declared, that the Defendant was a trustee of the lands and hereditaments comprised in the deed for the Plaintiff, within the meaning of the Trustee Act, 1850; and that some proper person might be appointed to convey the said lands and hereditaments, for all the estate and interest of the Defendant therein, to the Plaintiff, in the place of the Defendant.

Argument.
 —

Mr. Cairns, Q C., and Mr. Perceval, for the Plaintiff:—

The Plaintiff only intended to make his son a trustee of this property. The statute relating to the *Bedford Level*, 15 Car. 2, c. 17, ss. 16, 17, and 48, shews that there was nothing in the constitution of the governing body to prevent a trustee only of land within the *Level* from being qualified to be a bailiff. In the cases in which it has been decided that there can be no recall of land conveyed as a qualification for being a member of Parliament or to kill game, the

statutes imposing the qualification made it necessary that the ownership of the land should be beneficial: *Ward v. Lant* (a), *Birch v. Blagrove* (b), *Platamone v. Staple* (c), *Roberts v. Roberts* (d), *Doe v. Roberts* (e), *Brackenbury v. Brackenbury* (f), *Groves v. Groves* (g), *King v. Monday* (h), *Cecil v. Butcher* (i).

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Then, secondly, this qualification has been recalled before the person to whom it was conveyed even knew of it.

VICE-CHANCELLOR SIR W. PAGE WOOD.—I am clearly of opinion that the qualification required by this Act is the beneficial ownership of land within the *Bedford Level*, and not a mere possession of it as a trustee. In that respect, it is like the case of jurors and others who have public duties to perform. The governing body under this statute relating to the *Bedford Level* have large powers and important duties, and if the ownership required be not a beneficial ownership, a pauper would be eligible, which certainly could not be the intention. So far, I think, that this case comes within the doctrine laid down by the authorities which have been cited. But there seems to be a question here, as the deed, though registered, was not communicated to the son, whether the transaction was complete without his acceptance of it. He might have rejected it when he knew of it, and then, according to *Pitt's case* cited in *Birch v. Blagrove* (b), there may be a locus penitentiae for the Plaintiff.

Mr. Willcock, Q. C., and Mr. Grenside, for the Defendant:—

The grantor cannot come here to avoid his own deed ;

(a) Prec. in Chanc. 182.

(b) Amb. 264.

(c) Coop. 250.

(d) Daniel, 143.

(e) 2 B. & Ald. 367.

(f) 2 J. & W. 391.

(g) 3 Y. & J. 163.

(h) Cowp. 530.

(i) 2 J. & W. 565.

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 ———
Argument.

even though it was voluntary it would be valid and binding against him. On the face of this deed, there arises no resulting trust, and parol evidence is inadmissible to create such a trust.

Mr. *Cairns* in reply.

Judgment reserved.

May 8th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

One question argued in this case was, how far parol evidence could be given to prove the trust which it is sought to establish against the infant Defendant in respect of this land; and I have no doubt, if the Statute of Frauds had been pleaded to this bill, that the plea must have succeeded. In *Cottingham v. Fletcher* (a), the Plaintiff, being at the time "of the *Romish* persuasion, assigned an advowson to the Defendant for the term of ninety-nine years," and, afterwards, having conformed to the Protestant religion, he filed a bill for a re-assignment of the term, suggesting, that he had only assigned it in trust for himself, and to avoid the provisions of the statutes which vested presentations of livings in the gift of papists in the two Universities. To this bill a plea and answer were put in, and Lord *Hardwicke* held, that the answer overruled the plea; but he said, that, if the plea had stood alone, it would have been sufficient.

There is no evidence in this case, except the previous letter of the Plaintiff to the Registrar of the company, in which he merely says, that he is desirous of giving his son a bailiff's qualification. The deed subsequently executed by the Plaintiff expresses that the conveyance was in consideration of natural love and affection; and another question raised was, whether, independently of the statute, any evi-

(a) 2 Atk. 155.

dence could be given to contradict the deed. However, as the statute has not been pleaded, I had better consider the evidence as admitted, and treat the case accordingly.

1857.
CHILDERS
v.
CHILDERS.
Judgment.

It is clear, in this case, that there was no fraud on the part of the son, and that he was not in any fiduciary relation to his father. The deed, when executed, remained in the father's possession, but it was registered, and the son was thereby *primâ facie* made the owner of the property conveyed by it. It was argued, that there is nothing in the statute making it necessary that the property qualification should be a beneficial ownership, but I came to the conclusion that I could not so construe it. The Act constitutes a body, consisting of a Governor, Bailiffs, and Conservators, and gives them all the authorities of commissioners of sewers, and very large powers; and it seems to me, that it would be inconsistent, as in the case of jurors and others who have public duties to perform, and for whom a similar qualification is requisite, to hold that any but a personal qualification by beneficial ownership would satisfy the requirements of the Act. It was argued, that it was only like property which a body of persons were desirous of clearing for their own benefit, such as the property of railway companies; but there are public duties imposed upon the governing body, and I am therefore of opinion, that the qualification was intended to be a beneficial ownership of land. The case then falls within that class of authorities which establish that a deed creating a qualification of this kind, if parted with, is irrevocable, and that the person who executed it cannot be heard to say, that he intended it to take effect in fraud of the law. I make this observation, because Sir *T. Plumer*, who seems to have been anxious to restrict the operation of this rule of law, says, in *Cecil v. Butcher* (a), that three things must concur to enable a donor to set aside a deed so executed by him: namely, first, that the deed must not be parted with; secondly, the object for which it

(a) 2 J. & W. 578.

1857.
 CHILDERS
 v.
 CHILDERS.
 —
Judgment.

was executed must fail; and, thirdly, it must not have been communicated to the donee. The deed, in this case, having been registered, it cannot be said that it has not been parted with. It is different from the case of a deed retained secretly by the person who executed it, without communicating the fact to any one. The moment it was registered, there was a complete publication; so that the cases in which the transaction was kept secret have no bearing on a case like this.

In *Pitt's case*, referred to in *Birch v. Blagrove* (a), the decision appears to have been in conformity with the whole current of the authorities; but Lord *Hardwicke* says, that if the qualification had not been made use of, and the donor had discovered his mistake and repented of it, a contrary determination might have prevailed. It does not appear whether the deed of gift was retained by the donor in that case or not. Here, the deed was registered, and the donee thereby became duly qualified to be a bailiff of the *Level*, and might have executed all the functions of that office, if elected. Whether he was elected or not might depend upon accident, he was entitled to the full benefit of the deed from the time of its registration.

The only doubt I had arose from dicta in some of the cases, which seem to intimate that there might be a locus poenitentiae for the donor who had executed such a deed, where the object for which he executed it altogether failed; but, on consideration, I am of opinion, that I cannot make such a distinction. I think it very doubtful whether those dicta can stand, looking at the recent decisions on this subject. But, even if they can, they are not applicable to the present case, for I must treat this deed as having its full effect; and I cannot allow the Plaintiff to say, I intended this deed to operate in fraud of the law. The bill must, therefore, be dismissed.

(a) Amb. 264.

1857.

IN RE FRYER.
MARTINDALE v. PICQUOT.

March 18th.

THE Defendant *Picquot* was the survivor of three trustees for sale under the will of *Fryer*, deceased.

Trust—
Trustee.

In 1847, the three trustees sold leasehold estate of the testator. They all three joined in giving a receipt; the purchase-money was paid to one of them named *Molloy*, who died in 1852, and was by him retained. He was a solicitor, and the certificate found that he “acted in the matter of the sale as solicitor for himself and the other trustees.”

Lands devised to three trustees, upon trust for sale, were sold and the purchase-money paid to one of them, who was a solicitor, and acted in the matter of the sale as solicitor for himself and the other trustees.

In 1855, a suit was commenced by summons for the administration of the testator's estate, and the common decree was made.

The money having been retained by him and lost: *Held*, after his decease, that it must be taken to have been received by him not in his capacity of solicitor, it being no part of his duty in that capacity to receive it, but in his capacity of trustee; and that the survivor of the three could not, upon a common decree for an account, be held liable for its loss.

Upon the cause coming on for further consideration, Mr. *Drewry* and Mr. *S. James*, for the Plaintiff, sought to charge the Defendant *Picquot* with the money so allowed to remain in the hands of *Molloy*,—on the ground that the purchase-money was paid to the latter, not as trustee, but as solicitor and agent for the three trustees; so that it was money received to the use of the surviving trustees, and therefore of the Defendant.

Mr. *Bagshawe*, jun., for the Defendant.

Mr. *Drewry* replied.

The following cases were cited:—*Styles v. Guy* (a),

(a) 1 M’N. & G. 422.

1857.
In re
FRYER.

Davenport v. Stafford (a), Biggs v. Penn (b), Strong v. Strong (c), Brice v. Stokes (d).

MARTINDALE

v.
PICQUOT.

Judgment.

The VICE-CHANCELLOR SIR W. PAGE WOOD said:—The money must be taken to have been received by *Molloy*, not in his capacity of solicitor, it being no part of his duty in that capacity to receive it, but in his capacity of trustee. It was, therefore, in effect his sole receipt, his co-trustees having joined in giving it merely for conformity; and that being so, the Defendant *Picquot*, the survivor of the three trustees, could not upon this decree,—the mere common decree, by which the question of wilful neglect and default was not put in issue,—be held liable for the loss of the money.

(a) 14 Beav. 319.

(c) 18 Beav. 408.

(b) 9 Jur. 368.

(d) 11 Ves. 319.

March 23rd
and 26th.
Wills—Satisfac-
tion—
Debts.

EDMUNDS v. LOW.

A SPECIAL CASE.

Although a direction in a will to pay debts and legacies is sufficient to rebut the presumption that a legacy was intended in satisfaction of a debt, a direction to pay debts (without more) is not sufficient for that purpose.

Reuben Miles, at the time of making his will and the codicil thereto, and also at the time of his death, was indebted to his daughter, who together with her husband was Plaintiff in the special case, in the sum of 25*l.*, being the balance of certain sums amounting to 86*l.* 12*s.*, which the daughter; before her marriage (solemnised in May, 1854,) had deposited with the testator, but of which the whole, except 25*l.*, had been repaid before the date of the codicil.

Nor will that presumption be rebutted by the circumstance that the debt was liable to variation in amount, *e. g.* where it was in respect of deposits made with the testator, the creditor drawing on him from time to time in respect of such deposits; nor by the circumstance, that by reason of the creditor (a lady) marrying before the date of the legacy, the debt became payable to her husband, unless the legacy be to her separate use, or large enough to be subject to her equity to a settlement.

See v. Williams. 6. W. R. 712.

The testator, by his will in June, 1854, directed his just debts and funeral and testamentary expenses to be paid as soon as might be after his decease; and, after giving certain pecuniary legacies, he devised and bequeathed all his residuary real and personal estate to trustees, upon trust to sell, and to invest the proceeds which should remain *after payment of his debts*, funeral and testamentary expenses, and the legacies thereinbefore given, as therein mentioned, and to hold the same upon certain trusts, for the benefit of his daughters and their issue.

1857.
EDMUNDS
v.
LOW.
Statement.

By a codicil, dated October, 1855, the testator bequeathed to his daughter, the Plaintiff, the sum of 100*l.* absolutely.

The question for the opinion of the Court was, whether the debt of 25*l.* was satisfied by the legacy of 100*l.* given by the codicil.

Mr. *Bedwell*, for the Plaintiffs, contended that the debt was not satisfied by the legacy.

Argument.

The Court laid hold of slight circumstances to take a case out of the rule, that a debt due from a testator shall be presumed to be satisfied by a legacy of an equal or greater amount bequeathed by his will to the creditor. And here,

First, there was a charge of debts, as to which the same principle applied as in the case of a charge of debts and legacies: *Chancey's case* (a).

Secondly, the debt was in itself contingent and uncertain, as being a debt due upon an open and running account; and in such a case, since the testator might not know whether he owed money to the legatee or not, it cannot reasonably be presumed that he intended a legacy to be in satisfaction of a debt which he did not know that he

(a) 1 P. Wms. 410.

1857.
 EDMUNDS
 v.
 LOW.

Argument.

owed, any more than a legacy can be presumed to be in satisfaction of a debt contracted after the making of the will: *Rawlins v. Powel* (a).

Thirdly, the legatee was a feme covert; the debt therefore, although originally due to her, became in the testator's lifetime and before the date of the legacy a debt payable to her husband. On the other hand, the legacy was intended for the daughter, and the Court would not presume such a legacy to have been intended as a satisfaction of the husband's claim.

Mr. T. H. Hall for the Defendant:—

Where there is in the will an express direction to pay debts and legacies, the Court has held that circumstance sufficient to rebut the presumption in favour of satisfaction. But here the direction is merely to pay debts and the legacies given in the preceding part of the will, and this legacy is given by the codicil. As to the legacy in question, there is no such direction; and a mere direction to pay debts has never yet been held sufficient to rebut the presumption.

And as to the second point, even assuming this to have been an open and running account, still it has not been altered since the date of the codicil.

Mr. Bedwell replied.

The VICE-CHANCELLOR referred to *Wathen v. Smith* (b) and *Hales v. Darrell* (c): but reserved judgment.

(a) 1 P. Wms. 299. (b) 4 Mad. 325. (c) 3 Beav. 324.

1857.
 EDMUNDS
 v.
 LOW.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case is, whether a sum of 25*l.* due from the testator to his daughter, a married woman, has been satisfied by a bequest to her of 100*l.* in the codicil to his will.

Three points were relied upon by the counsel for the Plaintiff.

The first point was, that the will contained a direction to pay debts. But, after looking through all the authorities, I do not find any that has proceeded so far as to decide that a direction to pay *debts* alone is sufficient to rebut the presumption of satisfaction. In all the authorities relied on for this purpose, the direction is to pay *debts and legacies*. A direction to pay debts alone may, no doubt, be looked upon as an ingredient; and in *Rowe v. Rowe* (a) Lord Justice *Knight Bruce* gladly availed himself of such a charge, coupled with other circumstances, as rebutting the presumption of satisfaction.

If it were an open question, how far the rule in favour of such a presumption stands on a sound footing, it would be one well deserving consideration: but that rule is now too strongly fixed to be shaken.

In *Rowe v. Rowe*, the question was, whether a legacy bequeathed by the testator to his wife, he being indebted to her in respect of moneys settled to her separate use, but which had been received by him with her concurrence, was to be deemed a satisfaction of that debt. The learned Judge says, "with reference to that point it is well to

(a) 2 De G. & S. 297, 298.

1857.
 EDMUNDS
 v.
 LOW.
 Judgment.

observe that the testator, the husband, thus expresses himself:—‘I also appoint my nephew to be my sole executor, to pay all my just debts, funeral expenses, costs of proving this my will, taking to himself all the remainder and residue of the said property of whatsoever kind and wheresoever.’ The authorities do not, I think, render it right for me to disregard these expressions on a question of intention. This, however, is not all. Lord *Lyndhurst*, in *Bartlett v. Gillard* (a), held that the circumstance of the gift of the original annuity to the lady being for her separate use, and of the other annuity given to her not being for her separate use, was a material fact. Whether I should have thought such a difference material I need not say; but I find that authority, and I follow it. There is a distinction in the circumstance that there the legatee was not the wife of the testator; whereas in this case she was the legatee, the creditor, and the wife of the testator. At the instant, therefore, of his death, she became an unmarried woman. That is a distinction; but still I do not think it enough to support a variance in the decision between the two cases. Assuming the case of *Bartlett v. Gillard* to be right, as I do, and not saying what I should have thought but for the decision, I am of opinion that the correct conclusion in the present case is in favour of the Plaintiff; and I so decide.” It is plain, therefore, that, as the Vice-Chancellor called in *Bartlett v. Gillard* to his assistance, he did not rely on the mere circumstance of the direction for payment of the testator’s debts. He called in the other circumstance, without which he probably could not have held that the presumption was rebutted.

Here there is no charge of legacies except what is contained in the will; that charge is confined to the legacies “thereinbefore mentioned;” and the legacy in question was given, not by the will, but by a codicil.

(a) 3 Russ. 156.

The second point relied on by the counsel for the Plaintiff was, that the debt was in itself contingent and uncertain, as being a debt upon an open and running account.

1857.
EDMONDS
v.
LOW.
Judgment.

It is true, that, in *Rawlins v. Powel* (a), it was held, that where there was an actual open and running account, inas-much as the testator could not be supposed to know what the balance of a running account would be, or whether he owed any money or not, he could not intend the legacy to be in satisfaction of a debt which he did not know that he owed. But, in the case before me, the debt is in no sense a debt upon an open and running account. It is simply this, that the young lady before her marriage was in the habit of plac-ing, from time to time, in her father's (the testator's) hands certain sums of money. Her father made no advances to her, but simply paid her back, from time to time, sums on account of the moneys deposited. In such a course of dealing, it could never happen that any thing would become due from the daughter to the father. In that sense there was no open or running account between them. He simply made repayments, and the transaction could only result in a debt to the daughter. I fear, therefore, that *Rawlins v. Powel* will not assist the Plaintiff.

The third point was, that, as the daughter was a feme coverte, the debt, although originally due to her, being in respect of moneys paid by her to her father before her marriage, became in his lifetime and before the date of the legacy in question payable to her husband; whereas the legacy, although not in terms to her separate use, was a legacy intended for the daughter; and the Court would not presume such a legacy to have been intended as a satis-faction of the husband's claim. I should have been very glad to follow *Bartlett v. Gillard*, treating this debt as a

(a) 1 P. Wms. 299.

1857.
 EDMUNDS
 " .
 Low.
 Judgment.

debt to the husband, and the legacy as a legacy to the wife; but here the legacy is payable to the husband in right of his wife. It is clearly his, unless she can be entitled by virtue of her equity to a settlement; and here, unfortunately, the legacy being only 100*l.*, no such equity exists.

I am compelled, therefore, upon the authorities, to hold, though with great reluctance, that there is nothing to take this case out of the general rule, which presumes a debt to be satisfied by a larger legacy to the creditor.

The question, therefore, must be answered in the affirmative.

Minute
 Decree.

DECLARE that the debt is satisfied by the legacy of 100*l.* mentioned in the special case.

Jan. 23rd,
 30th.

TODD v. STUDHOLME

Administration—Creditors' Suit—Funds in Court—Distribution by Mistake—Mortgagee—Creditors—Liability to refund—Purchaser paying Money into court—Title Deeds—Solicitor and Client—Costs.

IN the year 1846, *Robert Hodgson* filed a bill on behalf of himself and all other creditors of *John Hodgson* deceased, against *Joseph Hodgson* and others, praying for the administration of the real and personal estate of the deceased.

The cause was heard by Vice-Chancellor *Kindersley* in August, 1846, and the common administration decree

Where a fund, paid into court in a creditors' suit, has been distributed by mistake among specialty and simple contract creditors to the exclusion of a mortgagee, this Court holds such creditors liable to repay, not *in solido* but *pro rata*; and no creditor will be fixed with liability in respect of the rateable part which the mortgagee may fail to recover from a creditor, who, since sharing in the fund, has become insolvent, or cannot now be found.

Pursuant to a decree in a creditors' suit, real estate was sold, and the purchase-money

was made, directing a sale of the real estate of the deceased and payment of the purchase-money into court, in the usual form. And the real estate was sold in lots accordingly.

1857.
TODD
v.
STUDHOLME.
Statement.

Part of the real estate of the deceased, being that comprised in Lots 3, 4, and 5, was subject to a mortgage by way of transfer to one *Robert Todd* for securing 1000*l.* and interest. The mortgage was mentioned in the conditions of sale, which also stipulated that the title deeds retained by the transferee would be delivered over to the purchaser of Lot 3.

Todd took no part in the suit or in the sale of the property, but he was made a conveying party to the three deeds of conveyance of Lots 3, 4, and 5, in consideration of the purchase-money being paid into court. Those deeds were brought to him upon his death-bed by his solicitor

paid into Court. In consideration of such payment, a mortgagee, who was not a party to the suit, but whose mortgage was noticed in the conditions of sale, executed the conveyance, but the fund was distributed among the other creditors without any payment being made to the mortgagee.

Held, upon bill filed by his personal representative, that the latter was entitled to recover, as follows:

(1) From the Defendants who had been paid simple contract debts, the several sums paid to them, the total amount of such sums being less than the Plaintiff's claim.

(2) From the only specialty creditor, so much as might be necessary to satisfy what might remain due to the Plaintiff for principal moneys and interest, after deducting the total amount of the moneys paid to the simple contract creditors, whether parties to this suit or not.

(3) And from the solicitors of the Plaintiff in the creditors' suit, whatever might be necessary to make good any deficiency arising by reason of some of the creditors becoming insolvent, or of others not being to be found, or the like: it being the duty of such solicitors to see that the purchase money paid into court was properly applied.

Held, also, that the purchasers, upon payment of the purchase money into court, had discharged the only condition incumbent upon them, and were relieved from all responsibility as to its application. But the purchaser of the largest lot, having allowed the title deeds to remain with the mortgagee, the bill, as against him, was dismissed without costs.

Held, further, that, although, under the circumstances, the mortgagee's solicitor was chargeable, as between his client and himself, with gross negligence in not placing a stop order on the fund in the original suit, his duties were dehors that suit, in which the primary duty lay with the solicitors of the Plaintiff, who had the distribution of the fund, and that in this suit he could not be made responsible.

Principles by which the Court is guided in giving directions as to costs in a suit of this nature.

1857.
 TODD
 v.
 STUDHOLME.
 —
Statement.

John Tiffin, of the firm of *Studholme & Tiffin*, who was also concerned for the purchasers, and were executed by him within a few hours of his death.

Todd died on the 27th of June, 1851, having by his will appointed his widow *Mary Todd* his sole executrix.

The cause of *Hodgson v. Hodgson* came on to be heard on further directions on the 13th of March, 1852; and in pursuance of an order therein made by Vice-Chancellor *Kindersley*, the sum of 1964*l.* 6*s.* 9*d.*, being the balance of the fund in court after payment of costs, was distributed as follows:—1337*l.* 16*s.* 2*d.* was paid to the Defendant *Studholme*, as the personal representative of *Tiffin*, in full discharge of a bond debt secured to him in trust for other parties; and the residue was apportioned among the several simple contract creditors.

This distribution took place without any payment having been made on account of the principal money and interest secured to *Robert Todd* by his mortgage.

Mary Todd, immediately upon discovering what had occurred, addressed a circular letter to the simple contract creditors, calling upon them for repayment, and threatening proceedings in Chancery in the event of their refusal. Some complied and paid sums to a small amount, but others having refused, she now filed her bill against all the creditors who had so refused payment, against *Studholme* as the partner and personal representative of *Robert Tiffin*, who had obtained letters of administration to his estate from the Consistory Court of Carlisle, against *Robert Hodgson*, the Plaintiff in the suit of *Hodgson v. Hodgson*, against the Messrs. *Gregg* who had acted as solicitors of the Plaintiff in that suit, and against the purchasers of Lots 3, 4, and 5, seeking repayment of her

mortgage money and interest by all or any of the Defendants, as the Court might think her entitled.

1857.
TODD
v.
STUDHOLME.
Argument.

Mr. Rolt, Q. C., and Mr. Bagshawe, jun., for the Plaintiff, contended that she was entitled to this relief against all the Defendants:—Against *Studholme* as the partner, and against him and *Robert Tiffin* as the personal representatives of *John Tiffin* deceased, inasmuch as the conduct of the latter in parting with the deeds of conveyance while the mortgage money remained unpaid, and in allowing the order for the distribution of the fund in Court to be made without notice to the Plaintiff, was either wilfully fraudulent, or so grossly negligent as in the estimation of the Court to amount to fraud; and as regarded *Studholme*, was a breach of the duty owed by himself and his partner as the Plaintiff's solicitors. Against the *Greggs*, inasmuch as their conduct in causing the funds to be distributed in violation of the Plaintiff's rights, of which they had notice, was grossly negligent and a breach of their duty as officers of the Court. Against all creditors who had been paid out of the fund in court, on the ground that the Plaintiff had a specific lien on the fund, which gave her a priority to all their claims. And lastly, against the purchasers, inasmuch as, although they all had notice of the Plaintiff's mortgage from the conditions of sale, they had allowed the title deeds to remain in the Plaintiff's possession; and two of them, having employed *Studholme* and *Tiffin* as their solicitors, had notice, when they took their conveyances and consented to the distribution of the funds in court, that the mortgage debt and interest remained unpaid.

They cited *Ezart v. Lister* (a) to shew the personal liability of solicitors in the position of Messrs. *Gregg*; and

(a) 5 Beav. 585.

1857.
 TODD
 v.
 STUDHOLME.
 Argument.

Brydges v. Branfill (a), to shew that this extends not only to those who wrongly pay, but to those who consent to such wrong payment.

Mr. *Daniel*, Q. C., and Mr. *Osborne*, for the Defendants *Studholme* and *Robert Tiffin*, contended that the first act of neglect was on the part of the Messrs. *Gregg* as solicitors for the Plaintiff in *Hodgson v. Hodgson*, in obtaining the order on further directions in the form in which it was obtained. *Tiffin* had a right to assume, that what was done in that suit was rightfully done. And if, as between himself and his client, he was chargeable with negligence in not getting a stop order or otherwise, the remedy was at law, and this Court had no jurisdiction to make him responsible: *Frankland v. Lucas* (b).

Mr. *Cairns*, Q. C., and Mr. *Amphlett*, for the Messrs. *Gregg*, relied on an affidavit by which those Defendants denied notice, at the date of the order on further directions, that the mortgage debt remained unpaid; and contended, that they had a right under the circumstances to presume that it had been paid, if not out of the purchase-money arising from the sale, out of some other source. On the other hand, *Tiffin*, or his firm, had full notice that the fund was about to be distributed, and notice to them was notice to the Plaintiff. It was not Messrs. *Gregg's* duty to act as solicitors not only for the Plaintiff in *Hodgson v. Hodgson*, but for the Plaintiff in this suit, or to write to her to inquire whether her debt had been paid, and whether she was satisfied with what her solicitor was doing on her behalf.

In *Izard v. Lister* there was actual or constructive notice, and the parties fixed with liability had taken active

(a) 12 Sim. 369.

(b) 4 Sim. 586.

steps, behind the backs of those entitled, to obtain payment of the money. Here the whole mischief had arisen from *Tiffin's* misconduct.

1857.
TODD
v.
STUDHOLME.
Argument.

At any rate, if the Court should hold the *Greggs* liable, it will give them liberty to enforce the decree for anything they may be called upon to pay, and may pay, in respect of what is due from creditors, as in cases of principal and surety. This is necessary, because it will not be for the interest of the Plaintiff to enforce it beyond a certain extent.

Mr. *Faber* for the personal representatives of *Rowlands*, the purchaser of Lot 4, contended, that, on payment of the money into court, he was discharged from all liability in respect of its application, nor could he be held responsible for any negligence in not obtaining possession of the title deeds, his lot being one of the smallest to which those deeds related. And,

On behalf of another Defendant, *Mary Barwise*, a simple contract creditor, he consented to repay the amount she had received, but claimed costs, on the ground that, had the decree in *Hodgson v. Hodgson* been re-heard, she would have been entitled to her costs.

Mr. *Eddis* for the parties beneficially interested under the bond :—

The Plaintiff's right is not against the creditors who have been wrongly paid, but against her own solicitor; and her remedy against him is at law.

If specialty creditors are liable at all, it can only be in a secondary degree, and their liability is restricted to the amount which will remain after deducting from the

1857.
 TODD
 v.
 STUDHOLME.
 ———
Argument.

Plaintiff's claim not only all sums which may be actually recovered by her from simple contract creditors, but all sums which have been paid to such simple contract creditors, irrespective of the question, whether, by reason of the insolvency, which the bill alleges, of some of such creditors, or by reason of others not being to be found, the Plaintiff may fail to recover what has been so paid to them.

[He cited *Jewon v. Grant* (a).]

Mr. *Brodrick*, for *Joseph Hodgson*, the purchaser of Lot 3, and *Dixon*, the purchaser of Lot 5, relied upon the fact of the money having been paid into Court as relieving them from all responsibility. And as to *Joseph Hodgson*, who had employed Messrs. *Studholme & Tiffin* as his solicitors, he cited *Kennedy v. Green* (b) to shew that although notice to solicitors may be presumptive notice to the principal, the presumption must be so strong that it cannot be doubted; and there could be no presumption of irregular conduct in *Tiffin* towards his client.

Mr. *Rolt*, Q. C., replied.

Judgment reserved.

Jan. 30th.

—
Judgment.

THE VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case is happily one of rare occurrence; and that very circumstance gives rise to the principal difficulty of the questions it involves.

It arises thus. The Plaintiff *Mary Todd* represents *Robert Todd*, who was entitled to a sum of 1000*l.* under an

(a) 3 Swans. 659.

(b) 3 My. & K. 899.

indenture of transfer of mortgage of the 21st of December, 1843, upon certain real property, which was sold under a decree of Vice-Chancellor *Kindersley*, made in the cause of *Hodgson v. Hodgson*.

1857.
TODD
v.
STUDHOLME.
Judgment.

Robert Todd, the transferee of the mortgage, was not a party to that suit, nor was he a concurring party to any of the previous arrangements as to the sale; but the property was sold free from incumbrances; there was nothing to specify that it was other than a fee simple which was being sold; and notice was taken of the mortgage in the conditions of sale, the 14th condition mentioning the transfer, and the 18th stipulating that the deeds held by the transferee would be delivered over to the purchaser of Lot 3. The property, therefore, must be taken to have been sold free from the incumbrance; and this, of course, could not be effected without the concurrence of *Robert Todd*.

Todd, it seems, was at that time very ill; but he expressed to his solicitor *Tiffin*, a partner in the firm of *Studholme & Tiffin*, his intention to be put to no expense in the matter; that he would not go in and claim in the suit of *Hodgson v. Hodgson*; that he stood upon his mortgage as a security for the repayment of his money, and would do nothing until that money was paid. *Tiffin* acted for some of the purchasers—the purchasers of Lots 3 and 4—and seems to have had some communication with the Plaintiff in *Hodgson v. Hodgson*, and on his behalf he applied to *Todd* to concur in the conveyance, and brought him the deeds of conveyance to execute. *Todd*, as I have said, was then very ill, and some question was raised as to his execution of the deed; but upon the evidence I must take the deed to have been executed by him.

The deed purports to be a conveyance to the purchasers in consideration of the purchase-money being paid into

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court. It was handed over to the purchasers, and must of course have been so handed over to them through the instrumentality of the Plaintiff in the suit of *Hodgson v. Hodgson*. The Plaintiff in that suit is the person who made the sale, that is, through his solicitors. He is the person who was obliged to complete the sale on the part of the vendors, and he obtained, therefore, for his convenience, from *Todd* a conveyance of the property, *Todd* executing that conveyance in consideration of the purchase-money being paid into court.

The Plaintiff's solicitors must be taken to have been aware of the position in which *Todd* stood with reference to that conveyance. The money being paid into court with the concurrence of the mortgagee, they must, of course, have been perfectly aware of the fact of there being a mortgage, and that *Todd* was the mortgagee. They must, therefore, have been aware that *Todd* was the first person who had an interest in the purchase-money. There was nothing to shew that he had been paid off. It was suggested in argument that they might have imagined *Todd* to have been paid off by some other means; but, had that been so, a receipt for the money would have been indorsed on the deed: it would have been expressed in the deed that his debt was satisfied, and it would not have been expressed that the conveyance was made in consideration of the payment of the entire purchase-money into court. Upon this part of the case, therefore, there is no doubt that it was the duty of the solicitors of the Plaintiff in the suit of *Hodgson v. Hodgson* to see that *Todd* received out of the money so paid into court, and in consideration of the payment of which into court he had executed the conveyance, the full amount due to him for principal and interest upon his mortgage.

With this part of the transaction the Defendant *Studholme* appears to have had nothing to do; but it is

impossible not to say that his late partner *Tiffin*, who conducted the affair in the manner I have described, was guilty of gross and culpable negligence in not taking care,—especially considering the peculiar circumstances under which he appears to have obtained the execution of the conveyance by *Todd*—to put a stop order upon the fund. There is nothing which induces me to say that he was not justified in obtaining such execution; but taking into consideration the circumstance that *Todd* died within eight and forty hours after he had executed the deed, nothing could be clearer than *Tiffin's* duty to put a stop order on the fund. At the same time, I do not think that *Tiffin's* having neglected this duty excuses the Plaintiff in the suit of *Hodgson v. Hodgson*. When I say the Plaintiff, it is really more the act of his solicitors. They cannot be held to have been excused from seeing to the due application of this money, because the solicitors of the party, who was clearly entitled to be paid out of it in the first instance, had neglected to put a stop order on a fund, to which they knew, without any stop order, the mortgagee to be entitled, which was paid into court for him, and in consideration of the payment of which into court, and in consideration of that alone, he had concurred in the conveyance.

In consequence of no stop order having been put upon the fund, and in consequence of the Plaintiff *Hodgson's* solicitors having unfortunately forgotten or failing to observe its position, the money was distributed, by the order of Vice-Chancellor *Kindersley* of the 13th of March, 1852, after payment of costs, among the various creditors of the testator in the cause. The amount so distributed was 1,964*l.* 6*s.* 9*d.*, which appears to have been distributed thus:—1337*l.* 16*s.* 2*d.* was paid to the Defendant *Studholme*, as the administrator of *Tiffin*, in trust for other parties for whom *Tiffin* was trustee, and the rest was apportioned among simple contract creditors in the sums mentioned in the schedule to the bill.

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The Plaintiff—there appear to have been no laches on her part—as soon as she discovered what had happened, wrote letters to several creditors claiming to have this money paid back, and telling them, that if they did not pay it back she should be obliged to institute proceedings against them. The result was, that certain of the creditors did pay her back some small sums. Others, however, did not; and she has now filed her bill against the several creditors who have been paid, and who have not paid back what they have received, to call back what they have so received; against the several purchasers who take under the deeds of conveyance executed by *Todd* in the manner I have mentioned; against the representatives of *Tiffin*; against the Plaintiff in the suit of *Hodgson v. Hodgson*; and against the Messrs. *Gregg*—the solicitors of the Plaintiff in that suit—asking to have her mortgage money and interest repaid by all or any of the Defendants as the Court may think her entitled.

One thing, as I stated before the reply, seems to me clear, namely, that the Plaintiff has a right, as against the several creditors who have been paid, to be repaid her mortgage debt and interest out of the moneys which those creditors have so received. This Court has at all times allowed a creditor whose fund has been distributed in his absence, notwithstanding decided laches on his part in failing to come in and enforce his claim, to say that his rights have not been put an end to, and that he has a right to proceed against those who have received his moneys, and to obtain payment of his debt out of the moneys so received by them, according to his right of priority,—subject to the question which Mr. *Eddis* raised in his argument, and which must be considered, how far such a creditor is entitled to go against the several parties *in solido*, to the full extent of his debt, and to draw back the whole of the money they have received, when there is more than enough to pay all, or how far he is entitled, where any of such parties have

since become insolvent, to charge the whole of his claim upon those only who are solvent, on the ground that the fund they received was his fund, and that they received it with notice of that circumstance.

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On this part of the case, there seemed, certainly, to be some difficulty. The case is entirely new in one respect. It is not exactly the case of a creditor hanging back under a previous decree, and afterwards coming in and claiming to recover his money against the several parties who have been previously paid; but the fund is a fund which was in court, and belonged, in truth, to the Plaintiff in the first instance. So that I had, at first, some doubt whether I was not at liberty to deal with the several creditors who have been paid, as having been affected with notice of the trust, which undoubtedly arose from the circumstance of *Robert Todd* having joined in this conveyance in order to obtain his mortgage debt and interest, and in consideration of the purchase money being paid into court, and to say that, having taken the money with notice of this trust, those creditors must be held severally liable *in solido* to make good the full amount of the Plaintiff's claim, without calling upon the Plaintiff to deduct from the amount claimed by her, what by reason of the insolvency of some, or the absence of others, among them, she may eventually be unable to recover.

On the whole, I think it would be harsh to deal with the creditors on that footing. But it is a very different thing as to the solicitors of the Plaintiff in the suit of *Hodgson v. Hodgson*. As regards the creditors who came in under the decree, and among whom the fund was distributed, they had no means of ascertaining under what circumstances the fund was paid into court, or how it had been dealt with. All they had to look to was the decree which gave them the money. That left them liable to refund, in case the Court should find that the money had been distributed in

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error ; but I think it is a great deal too much to say, that I can fix them with knowledge of the trust that existed in favour of *Robert Todd*, or hold them answerable in any other manner than in the common case where a fund has been distributed and a creditor comes to draw it back.

That common case is settled by the authority of the decisions in *Gillespie v. Alexander* (a), and *Greig v. Somerville* (b), which establish, that where a creditor comes, after the distribution of a fund under the decree of this Court, and files his bill against any of the recipients of the fund to have that fund restored, he can only recover *pro ratâ* against them ; and that, of itself, shews that the Court does not regard the question of the absence of persons who have participated in the fund. In each of those cases, there were such persons who were not before the Court ; but the Court allowed the Plaintiff to recover against those persons who were before it not the full amount of his claim, but only *pro ratâ*, that is, an amount bearing the same proportion to his entire claim, which the amount distributed among the persons before the Court bore to the entire fund so distributed. In the first of the cases, *Gillespie v. Alexander*, Lord *Eldon* gave a written judgment after he had resigned the great seal, holding that this was the proper remedy. Of course, therefore, he must have held it to be immaterial whether the absent recipients were solvent or insolvent, because he only held each of those who were before the Court liable to recoupe *pro ratâ* in the proportions I have mentioned.

If that be so, it seems to me, in dealing with the creditors in the first instance, that the Plaintiff is entitled to recover from such of the Defendants as are simple contract creditors the full amount they have received, because, as regards simple contract creditors, no question of rateability can arise, the whole amount received by them being required for payment of the debts of a superior degree. It is only as regards the specialty creditor that the question is

(a) 3 Russ. 130.

(b) 1 Russ. & Myl. 338.

one of any importance. And it follows, from what Lord *Eldon* held in *Gillespie v. Alexander*, that the specialty creditor is entitled to say, that, before calling upon him to contribute, the Plaintiff must deduct from the amount claimed by her, not only so much as she may actually recover from such of the Defendants as are simple contract creditors, but the whole amount which has been distributed amongst such simple contract creditors, irrespective of the question whether she does or does not succeed in recovering from them the amount so distributed. And that all to which the Plaintiff can call upon the specialty creditor to contribute, is the balance after making that deduction from the amount of her claim.

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Such, then, being the Plaintiff's rights as against the creditors, there may be some balance which, after she has been paid all that she is entitled to be paid by the specialty creditor, she may fail to recover, either by reason of some of such creditors being insolvent, or of others not being to be found, or the like; and the question is, who ought to pay that balance or deficiency. It seems to me that the parties I must fix with this liability are the Messrs. *Gregg*, the solicitors of the Plaintiff in the suit of *Hodgson v. Hodgson*. I do not think it necessary to pursue the remedy further, and therefore I abstain from doing so; otherwise it might perhaps have been necessary to fix the Plaintiff *Hodgson* himself; but here the act is more the personal act of his solicitors: *Hodgson* himself is fixed as a simple contract creditor, in common with the other simple contract creditors. But as regards the actual payment of the money out of court, I must hold that the Messrs. *Gregg* did it with a want of care, which (although I entirely acquit them of the slightest suspicion of any other impropriety) is in itself, looking to the responsibilities incident to every dealing with the funds in this Court, a very serious matter. They have not adverted to the fact, that the money was paid into court entirely on the faith that the mortgagee was to be paid his

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debt, and that it was entirely on the faith of such payment that he joined in the conveyance. They have taken on themselves to see the fund distributed, regardless of these facts; and whatever loss the Plaintiff may sustain, whether by the insolvency of the parties or otherwise, it is for Messrs. *Gregg* to make good that loss.

There remain the purchasers of this property, against whom the Plaintiff attempted to assert a right to relief. It appeared to me, upon the argument, that no such right could be established, and I am still of that opinion. They have done all that they could do. They had a conveyance purporting to be made in consideration of the money being paid into court. When their money was so paid into court, they had done their duty, the only condition incumbent upon them was discharged, and they were thenceforward relieved from all responsibility as to the application of the fund. With regard to their subsequent consent to its being paid out of court, there was no reason why they should not consent, except the circumstance of their having neglected to ask for the title deeds. With that exception, their conduct was quite right; in every respect they had done all that they could be called upon to do. There was some little negligence on their part in not demanding the title deeds, which if they had done, probably all the parties to this suit might have been in a better position. But I do not think it necessary to say, and I certainly could not say without further inquiry, that this claim is to be established as a lien on the property in their hands, in consequence of any supposed negligence on their part in not insisting on having the deeds. The Plaintiff's remedy is already ample; and therefore, as regards the purchasers, I think the right order will be, to dismiss the bill without costs against them, the Plaintiff undertaking to give up the deeds to them. If she does not do that, I ought to make her pay the costs.

Mr. *Faber*.—My clients, the personal representatives of

Rowlands, who was the purchaser of a small lot, have a covenant from the purchaser of the larger lot for the production of the title deeds.

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The VICE-CHANCELLOR.—In that case they are in no default. I must dismiss them with costs; and those costs, I think, cannot be recovered by the Plaintiff against any of the Defendants, because those purchasers are brought here unnecessarily.

With regard to the other purchasers, the purchasers of lots 3 and 5, they actually entered into a covenant for the production of the deeds: I think I give them a benefit rather than otherwise, if the Plaintiff delivers to them the deeds. Therefore I dismiss the bill against them without costs.

There remains the question as to the costs of the suit. And first, as regards the position of *Tiffin's* representatives, I should be glad if I thought anything allowed me so to deal with the case as to make them answerable for what has occurred. But I do not see how that can be done in this cause. What *Tiffin* did was not in the execution of any duty in the suit of *Hodgson v. Hodgson*, but entirely dehors that cause; and though, as I said before, there was very gross negligence on his part, which has probably been the cause of all the difficulty into which these parties have been brought, the primary duty in the cause of *Hodgson v. Hodgson* was thrown on the *Greggs*, the solicitors of the Plaintiff in that suit. If any loss had accrued to *Todd's* representatives, I need hardly say, they would have had a very clear remedy—not in this Court, but at law—against *Tiffin's* representatives for his negligence. *Studholme* remains here as administrator of *Tiffin* in his capacity of specialty creditor, and as none of the creditors can have costs, *Studholme*, of course, can have none. *Robert Tiffin*, who apparently is only here as having taken administration to the deceased out of the Court of *Carlisle*, and may now be dismissed, will also have no costs. I cannot give costs

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to the representative of a person who has conducted himself in the manner I have described.

Next comes the question as to the payment of costs, whether the creditors should pay costs jointly with the *Greggs*, or whether the *Greggs* alone should pay. As between the *Greggs* and the creditors, of course the payment of costs would properly fall on the *Greggs*. They were the persons who distributed the fund. The creditors simply took what the Court gave them. They had little or no opportunity, as it seems to me, of seeing how the money arose which was so distributed among them. There can be no doubt, therefore, that Messrs. *Greggs* would, in the first instance, be liable to pay these costs. My hesitation was only as to whether the creditors should not be made to pay costs in respect of this circumstance, that they all had a circular letter from the Plaintiff, calling upon them to repay this money, and, had they chosen to repay it, might have avoided the necessity of being brought here in this suit. But, on the other hand, it is perhaps rather too much to say, that persons receiving money from the hand of the Court, that money being distributed under the order of the Court, are to be fixed with costs, without having had any sufficient means of informing themselves of the exact merits of the case. If no one else were at hand to pay costs, it might be said, that, rather than allow the Plaintiff to lose his rights, the Court would leave the creditors to abide the result, notwithstanding the obvious hardship of the case, it being through no actual default on their part that the money came into their hands. But seeing that there are the means of recompensing the Plaintiff, in throwing the costs, as they must be thrown, on the *Greggs*, I think that justice will be done, if, without making any of the creditors liable to costs, I direct the balance to be made up by the *Greggs*, and the costs of the suit to be paid by them, excepting the costs to be paid to Mr. *Faber's* clients, the purchasers of lot 4, which, as I have already said, must be paid by the Plaintiff.

DECLARE that the Plaintiff, as the personal representative of *Robert Todd*, the mortgagee in the pleadings mentioned, is entitled, in respect of the mortgage debt of 1000*l.*, secured to her testator by the indenture of the 21st of Dec., 1843, in the bill mentioned, to recover from the Defendants [here follow the names of all the Defendants who had been paid simple contract debts] the several sums paid to them under the decree or decreetal order of the 13th of March, 1852, made by Vice-Chancellor *Kindersley* in the suit of *Hodgson v. Hodgson*, in part satisfaction of the said mortgage debt.

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And that she is also entitled to recover back from the Defendant *Studholme*, as the administrator of *John Tiffin*, deceased, so much of the sum of 1337*l.* 16*s.* 2*d.*, paid to him as such administrator in respect of a specialty debt of *John Hodgson*, deceased, the testator in the cause of *Hodgson v. Hodgson*, as may be necessary to satisfy what may be due for principal moneys and interest in respect of the said mortgage debt, after deducting the total amount of the moneys paid to the said other Defendants, the simple contract creditors of the said testator *John Hodgson*, and to the other simple contract creditors not parties to this suit, under the said decree in *Hodgson v. Hodgson*.

Declare, that the Defendants, the *Greggs*, are liable to make good any deficiency which may arise in payment to the Plaintiff of the full amount of principal and interest secured by the said mortgage, after deducting the several sums which she is hereinbefore declared to be entitled to recover back from the Defendants in this suit, and the sums of money already received back by the Plaintiff from any creditors not parties to this suit.

Dismiss the bill with costs against the Defendants, the representatives of *Rowlands*, the purchaser of lot 4; and without costs against the Defendants, the other purchasers.

Take an account of what is due to the Plaintiff, and of what is payable by the respective Defendants, on the footing of the above declaration.

Tax Plaintiff's costs of the suit, and direct payment by the *Greggs* of such costs.

The Defendants, the *Greggs*, to be at liberty to enforce this decree in respect of any costs they may be called upon to pay and may pay on account of the deficiency in the moneys recovered by the Plaintiff.

Liberty to all parties to apply in Chambers in respect of enforcing the payment by the several Defendants of the moneys hereby directed to be paid by them.

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April 21st,
22nd, 23rd,
& 24th.

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*Statute of Li-
mitations—
3 & 4 W. 4, c.
27, s. 26—"Con-
cealed Fraud"
—Mental In-
capacity—
—Compromise.*

THE facts of this case and the evidence in support of them were very voluminous.

The following short summary is mainly abstracted from the judgment of the Vice-Chancellor, and is only intended to explain the legal points which arose in the case.

To prove that a fraud was concealed within the meaning of the 26th section of the Statute of Limitations (3 & 4 W. 4, c. 27), which enacts that the right of a person to recover land of which he has been deprived by a concealed fraud, shall first accrue at and not before the time at which such fraud should or might with reasonable diligence be discovered, it is

not sufficient to show that he was in such an imbecile or uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the Court cannot possibly estimate for this purpose the chance which the state of mind and education of a man may afford of his making such discovery, and is, therefore, compelled to assume that every one not actually a lunatic is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary.

Therefore, a suit cannot be maintained to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect, that, though cognisant of all the facts, it was necessarily a concealed fraud as to him.

Any man who is not a lunatic must be considered competent to agree to a compromise of litigation in which he is engaged, the circumstances under which the compromise was made not being such as to afford evidence of fraud.

A lady of the name of *Dorothy Windsor* died in the year 1757, at the age of eighty-four or eighty-five years. At her death she was seised in fee of the estate which was in question in this cause. This estate was about 3000 acres in extent, and was situated in the neighbourhood of *Newcastle*, and was stated to contain mines of coal, and to be consequently of considerable value. *Dorothy Windsor* seems to have outlived all her near relations, unless *Stote Manby* was one. He afterwards claimed to be the grandson of *Ann*, who was the daughter of *Cuthbert Stote*; which *Cuthbert* was the brother of Sir *Richard Stote*, the father of Mrs. *Windsor*. On her death no one came forward to claim the property for a time. Then Lord *Windsor* applied to the Crown, and obtained the appointment of a receiver for the Crown.

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In consequence, probably, of the mineral wealth of the property, claims were then asserted by various lords of manors to the copyhold parts, by way of escheat, and they appear to have taken active steps to assert their rights. Among others, and the most persevering, was Sir *Walter Blackett*. The other lords seem to have withdrawn from the contest; but Sir *Walter Blackett* procured attornments from the tenants upon giving them an indemnity for paying the rents to him. Subsequently, two gentlemen, named respectively *Calverley Bewicke* and *Daniel Craster*, claimed the property, as heirs of *Dorothy Windsor* through a remote ancestor. They came to an arrangement, that, as one or the other of them might be the heir, they would have no contest between themselves, but would take the property in equal shares. Having done this, they communicated with Sir *Walter Blackett*; and it appeared from the recitals in a bond which was given by *Bewicke* and *Craster*, and was put in evidence in this suit, that they had satisfied Sir *Walter Blackett* that their position was such that he could not venture to contest it with them, and he gave up to them such possession as he had obtained by attornment of the tenants, upon their arranging with the tenants, and entering into an indemnity, which released him in effect from the indemnity he had previously given.

In this manner, about the year 1758, *Bewicke* and *Craster* obtained quiet possession of the property; and from 1758 down to 1780, no claimant asserted his right except two persons, *Richard* and *Robert* his son, who took up his father's claim after his death, but this claim failed altogether. In 1780, however, an action of ejectment was commenced, to recover the property, by *Stote Manby* already mentioned, who was a very poor man. He was born in 1717, and lived at *Louth* in *Lincolnshire*. He was utterly illiterate, unable even to write. His claim was founded upon an allegation

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that he was the grandson of *Ann*, the daughter of *Cuthbert Stote*. He alleged that *Ann Stote* intermarried with one *William Manby*, a miller, about the year 1682. At the time of the ejectment being brought, in 1780, *Ann* had been long dead. She died in 1741, about thirty-nine years before, and *Dorothy Windsor* had then been dead twenty-three years. *Stote Manby* must therefore have been about twenty-three years of age when *Ann* died.

At this trial, evidence was adduced to shew that *Stote Manby* was, from the age of ten years, which would be from the year 1727, mentally incapacitated by an injury received from the kick of a horse. But two old witnesses, one 105 and another 101 years of age, who were not examined on that occasion, now deposed in this suit, that this accident occurred much later, namely, between 1760 and 1770, instead of 1727. The jury, however, it would seem, were not convinced at that time of the insanity of *Stote Manby*, for, although these facts were given in evidence, the claimant in that action failed.

Two real actions were then brought. One was brought to recover the "Coach and Six," a small public-house in *Newcastle*, part of the property; the other was for the bulk of the estates. Mr. *Harvey*, an attorney in practice in the city of *Newcastle* and living there, was the attorney for the Plaintiff *Stote Manby*. The actions came on for trial, and first the action as to the public-house, the "Coach and Six," was tried. The great question in the case was, whether or not *Stote Manby* was descended from *Ann*, the daughter of *Cuthbert Stote*; and from a part of the answer in this suit which was read for the Plaintiff, it appeared that the evidence given on the trial of the ejectment was this:—Numerous witnesses were called to shew that *Ann Stote*, who had died thirty-nine years before, had averred

from time to time that she was the niece of Sir *Richard Stote*, and that she had eloped at the age of fifteen with a miller or a baker, *William Manby*, and that she afterwards married one *Cooke*, a butcher. There was some evidence given to shew that she had asserted that the Plaintiff *Stote Manby*, as her grandson, would come in as the genuine descendant of *Edward Stote*; and this, so far as now appeared, was all the evidence then given to prove the relationship of *Stote Manby* to *Cuthbert Stote*. It did not appear that there was any documentary or other evidence to corroborate these statements of *Ann*, that she was the niece of Sir *Richard Stote*, or that she had married *William Manby*.

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It was a remarkable circumstance, that in this suit there was put in evidence a certificate of a marriage between two persons named respectively *Ann Stote* and *William Manby*, a miller. This marriage, according to the certificate, took place at a period at which *Ann Stote* would be of the age not of fifteen, but of eighteen years; and the certificate apparently had not been discovered at the time of that trial. Upon that trial, however, the jury of the town found a verdict for the Plaintiff.

The other real action then came on to be tried before a jury of the county; and being before the Court, and the jury being sworn, an agreement for compromise was come to between the Plaintiff and Defendants in open court. This agreement was made by an order of the Court as follows:—
“It is ordered, by the consent of the said parties and their attorneys, that the last juror of the jury empannelled and sworn in this cause should be withdrawn from the panel; and by the like consent and by the consent of *William Manby*, eldest son of the said *Stote Manby*, the demandant, who being present here in Court agrees to become

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a party to this order:—It is agreed and ordered, that *Calverley Bewicke* and *Daniel Craster*, esquires, the said tenants, shall pay unto Mr. *Thomas Harvey*, the attorney for the said *Stote Manby*, the sum of 1,500*l.*; and that the said *Stote Manby* and his son shall convey and join in conveying all and singular the premises in question in this cause, and also in question in the cause between the said parties tried at the present Assizes, held at *Newcastle-upon-Tyne* in and for the said town and county of the same town, by fine, recovery, or otherwise, at the expense of the said tenants or their heirs, as their counsel and the counsel on the part of the demandant shall require, to, for, and upon such uses, trusts, intents, and purposes as the said tenants or their heirs and the said counsel on each side shall reasonably advise and require, and that the money shall be paid and the conveyances executed within six months; and upon his and their so doing, the said tenants or their heirs shall also secure, out of the said estates or a competent part thereof, or out of some other lands or hereditaments in which the said tenants have a clear estate in fee simple, a clear yearly rentcharge or sum of 300*l.* a year, free and clear of all the taxes, parliamentary or otherwise, and all deductions and defalcations, to be paid quarterly at the four usual feasts, with proper powers of entry and distress, and powers to raise the same, in case of default of payment, by sale or mortgage, unto the said *Stote Manby*, his heirs and assigns, for ever, by such conveyances and assurances, at the expense of the said tenants, as he the said *Stote Manby*, his heirs and assigns, or his or their counsel shall reasonably advise and require.” Then it stated when the first payment was to be made. “It is also agreed and ordered, that *Thomas Davenport*, esq., shall be the counsel to advise on the part of the demandant, and that *John Wilson*, esq., shall be the counsel to advise on the part of the tenants; and it is also ordered, that the said Mr. *Harvey* shall give such release and discharge to

the said *Stote Manby* for all demands and charges as the said counsel shall advise; and the said *Mr. Harvey* shall convey the witnesses home at his own expense, and free the said *Stote Manby* from all other charges and expenses in anywise respecting this and the said other cause or any former suit on account of the premises in question. It is further agreed by the said demandant and his said son, that they will, within twelve months after the said money paid, make such further conveyances as the above counsel shall reasonably advise and direct; and it is further ordered, that mutual general releases shall be executed between the demandant and tenants." And all parties were to perform this order, and the order was to "be made a rule of His Majesty's Court of Common Pleas if the justices of the same Court should so please."

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After this, *Bewicke* and *Craster*, through *Heron* their attorney, tendered to the parties the money payable under the agreement; but they would not accept it. But *Harvey*, on behalf of *Stote Manby*, gave notice of motion for a rule to set aside the compromise. This, however, was not proceeded with, and the order was made a rule of Court. *Bewicke* and *Craster* then moved for an attachment to enforce the order, and by this step matters were brought to a conclusion. And two years after the compromise, namely, in 1783, deeds were executed consistent with the agreement. By these deeds, *Stote Manby* conveyed by lease and release all his interest in the property to *Bewicke* and *Craster*; and *Calverley Bewicke* granted the annuity of 300*l.* by way of charge on his moiety; and there was a recital in the deed shewing that the reason for that was, that *Craster's* moiety had become settled so as to create some difficulty in having the charge made upon it. The arrears of the annuity up to that time, amounting to 525*l.*, were expressed upon the face of the deed to be paid over to *Stote*

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Manby. The words "five hundred" were written upon an erasure not attested. One of these instruments retained its old date of 1782. In another the date was 1783, the "3" being on an erasure. That being discovered in 1786, upon the occasion of a mortgage of the property being made, the whole process was repeated, and all the deeds were re-executed.

In 1783, another deed was executed, by which *Harvey* obtained from his client, *Stote Manby*, a grant of one-third of the whole annuity of 300*l.* for his own benefit. By another deed of the same date, *Stote Manby* assigned over, and apportioned amongst his family, the remaining 200*l.* a year, in such proportions as to leave himself only 20*l.* a year, giving to his eldest son, *William Manby*, who was a party to the compromise, 100*l.* a year, and other parts of the annuity to his daughters. *Bewicke* and *Craster* were not parties to this deed, nor did it appear that they knew of it until some time afterwards, when letters were written to them concerning the payment of the annuity by several of these persons claiming under this deed. A barrister, named *Christopher Fawcett*, who had advised *Bewicke* and *Craster* on one stage of the case, was a formal party to this latter deed, but he did not execute the deed. The first of the letters to *Bewicke* and *Craster*, from the assigns of the annuity, requested that the whole 300*l.* might be paid to somebody at *Louth*. A subsequent letter, from the same parties, was proved, in which they requested that the 100*l.* might be paid to Mr. *Thomas Harvey* of *Newcastle*, and the other 200*l.* remitted. Then a letter from *Harvey* was produced, in which he complained that the remittances were not made to him direct; and a further correspondence, to which *Bewicke* and *Craster* were parties, in which they say they must put it into the hands of their solicitor, Mr. *Pearson*, who would pay any body he might

think entitled, but that they looked to the direction of those other persons, who had the grant of 300*l.* a year. The negotiation, however, ended by the annuity being paid to *Harvey*.

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It appeared, that, in 1783, after the compromise, *Stote Manby* married again, his former wife, the mother of *William Manby*, having died. In 1785 he made his will, and thereby he disposed of the 20*l.* annuity remaining to him among various persons, not including his son *William*. He died on the 31st of August, 1790, leaving *William Manby* his only son.

William Manby intermarried with the Plaintiff's mother in 1790. The bill stated, in terms mentioned in the judgment, that, from his childhood, he was dull of understanding; and that subsequently to his marriage, but before the death of his father, he became utterly imbecile, and continued to be so until his own death, which occurred on the 1st of February, 1809.

He left two children, namely, *Richard Stote Manby*, his eldest son, then an infant of the age of eleven years, and the Plaintiff *William Stote Manby*, then three years old. *Richard Stote Manby* died intestate, and unmarried, about four months after he attained twenty-one. Evidence was given to shew, that, for some time previous to his death, he was in a state of mental incapacity, produced or aggravated by his drunken habits.

The Plaintiff filed the bill in this suit claiming to be heir of *Dorothy Windsor*, and to be entitled to the estates by descent from her, and praying that the compromise and the proceedings consequent thereon might be set aside.

The Defendants claimed as volunteers under *Bewicke* and *Craster* who were parties to the compromise.

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Mr. Rolt, Q. C., Mr. Willcock, Q. C., Mr. Warren, Q. C.,
 and Mr. Locock Webb, for the Plaintiff:

The title of the Plaintiff's ancestor to these estates was admitted by the transaction in 1783; and, therefore, he has no occasion now to prove that he is the heir-at-law of *Dorothy Windsor*.

But if he is now called upon to prove his pedigree it is conclusively established by the evidence in this suit.

The Plaintiff has been kept out of possession of the estates by the Defendants and their predecessors in title, by means of a fraud committed upon the ancestor of the Plaintiff; and that fraud could not have been discovered sooner by the Plaintiff or those through whom he claims, by reason of the state of mind of the persons on whom the fraud was practised.

The exception in the 26th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, in cases of concealed fraud, applies to the case where a person has obtained a conveyance of property from a person of unsound mind: *Lewis v. Thomas*(a), *Price v. Berrington*(b). Time does not begin to run against a person defrauded until the discovery of the fraud: *Blair v. Bromley*(c). The onus of proving that the transaction was a fair one lies upon the Defendants: *Charter v. Trevelyan*(d), *Earl of Chesterfield v. Janssen*(e), *Bowen v. Evans*(f), *The Earl of Deloraine v. Browne*(g), *Hall v. Warren*(h), *Frank v. Mainwaring*(i), *Bridgman v. Green*(k). As to the question of identity arising in the pedigree: *Smith v. Henderson*(l), *Sewell v. Evans*(m). If

(a) 3 Hare, 26.

(b) 3 Ma. & G. 486.

(c) 2 Ph. 354.

(d) 11 Cl. & F. 714.

(e) 2 Ves. sen. 125.

(f) 2 H. L. C. 257.

(g) 3 B. C. C. 633.

(h) 9 Ves. 605.

(i) 2 Beav. 115.

(k) 2 Ves. sen. 627.

(l) 9 M. & W. 798.

(m) 4 Q. B. 626.

there is any doubt upon any of the facts the Plaintiff is entitled to have an issue sent to be tried at law.

The *Attorney-General* (Sir R. Bethell), Mr. Cairns, Q. C., and Mr. Toller, for the Defendants, were not heard.

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The several points taken upon the particular facts of the case are noticed in the judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Judgment.

Mr. *Attorney*, I think I ought not to call upon you in this case.

It appears to me that the Plaintiff has entirely failed to establish either of the two propositions, which are absolutely essential for maintaining his claim. I think, that he has failed to prove that any fraud was committed by the two persons whose descendants you now represent; and I think, even if I could infer, which I conceive myself in no way at liberty to infer, from the evidence before me, that any such fraud as has been alleged had been practised by these persons upon *Stote Manby* in 1781, there is nothing proved that could induce me to say that such fraud as is alleged was in any sense a concealed fraud within the meaning of the 26th section of the Statute of Limitations, which has been relied on by the Plaintiff in this case.

The principles that have been referred to in the argument for the Plaintiff are so trite, that they scarcely require any illustration. At the same time, no one can be dissatisfied at hearing cited from the decisions of judges who have presided in these Courts with a higher power and authority than that which I possess, and in language which I do not

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profess to imitate, those principles of justice and of equity which must guide the decision of this Court in all cases in which fraud is sought to be established against Defendants.

The Legislature has, in this as in every civilised country that has ever existed, thought fit to prescribe certain limitations of time after which persons may suppose themselves to be in peaceable possession of their property, and capable of transmitting the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of transactions which occurred at a distant period, when evidence in support of their own title may be most difficult to obtain. In our own country, those periods of limitation have varied from time to time. It has been thought right, that, where property has been transferred by certain public modes of disposition, a very short period should be limited within which the title may be impeached, as in the case of the Statutes of Fines. Other periods, of greater or less duration, have from time to time been fixed, within which, in ordinary cases, the rights of persons out of possession must be established, if at all. And in the particular case now before me, by the law as it stood in the year 1780, when the first attempt to establish a right to this property was made by a person claiming as a descendant of *Cuthbert Stote*, it was impossible for a claimant who had been out of possession for upwards of twenty years to assert his right by the ordinary action of ejectment; but it was necessary for him to have recourse to a more difficult and expensive process, namely, a writ of cousinage, which was one of the forms of real actions. A person out of possession was allowed to bring that action at any time within fifty years after his right accrued, a period of extreme remoteness, and calculated, in many instances, to work great injustice to those in possession. Since that time, the Legislature has thought that the time for asserting such rights ought to be abridged; and if the case had now to be tried,

the original claimant, *Stote Manby*, would not have any mode of obtaining relief, unless he could bring himself within some of the exceptions of the more recent statutes 3 & 4 Will. 4, c. 27, such, for instance, as that sought to be established in 1780, on the ground of lunacy. However, in 1780, he had a clear right to assert his title by writ of cousinage.

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This case has been opened before me as if the facts were, that two individuals, having no connection whatever with the deceased owner, but finding an estate vacant, had intruded themselves into possession of it, and had thus made themselves masters of a property to which they were perfectly aware they could maintain no title whatever. But the facts of the case seem to be these :

[His Honour then stated the facts as above given. In stating the facts of the case, his Honour observed that one argument for the Plaintiff had been, that the arrangement which *Bewicke* and *Craster* had made to divide the property between themselves, afforded evidence that they were aware they were taking possession of that to which they had no title. But his Honour said, that the circumstance that two persons, who believed that one or other of them could make a good title to property which each claimed adversely to the other, especially where the dispute between them was upon a question of pedigree, should come to an arrangement to divide the property between them, instead of wasting money in litigation, was not so uncommon as that such a transaction must necessarily be assumed to be wrong or fraudulent.

His Honour said, that he was surprised at the stress which the Plaintiff's counsel had laid upon the fact that *Stote Manby* had recovered a verdict in the real action concerning the inn at *Newcastle*. Of course, it was a circumstance

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in the Plaintiff's favour; but the question was, whether the compromise was fraudulent at the time it was made. The issue at the trial of that action was upon a question of pedigree, which depended entirely on evidence of the declarations of deceased persons. The Court was continually in the habit of observing upon the extreme danger of such testimony; and although, from the necessity of the case, it was admitted, it was never allowed to go to a jury without comment and caution by the judge as to the way in which such evidence was to be sifted. Its value depended, very materially, upon the memory of the witnesses; and therefore at this trial it was a most material circumstance that the declarations, of which evidence was given, were alleged to have been made some thirty-nine years before; and although one jury might find a verdict for the Plaintiff upon such testimony, it was by no means improbable that another jury would come to a totally different conclusion. Therefore, to say that *Stote Manby* was a victor who had gained the whole of his cause, and was about to recover all the estates, because the *Newcastle* jury had given a verdict in his favour with respect to the "Coach-and-six," was an unwarrantable assumption. After that verdict, the case must have been very doubtful. *Bewicke* and *Craster*, on the one hand, might have been sufficiently alarmed by it, to be willing to enter into terms, and to make a considerable sacrifice, in order to avoid the risk of losing the whole estate; but on the other hand, *Stote Manby's* attorney must have felt that his client's case was so infirm that he might fairly consider it not worth while to insist on the second trial, which might leave him in possession of the "Coach-and-six," but deprive him of any other benefit from the estates.

With respect to the compromise, his Honour said, that it was extremely difficult to argue that it was fraudulent; because it was made in open Court when the second cause was coming on to be tried, and the jury had actually been sworn,

which was a material circumstance. It was impossible that at such a time there should have been any such secret tampering with *Stote Manby's* attorney as had been alleged, and without proof of which the present Plaintiff could not possibly succeed; because the counsel of the parties must have been present in Court, for a juror was withdrawn. It was suggested in argument, that the counsel might have been themselves misled by fraudulent instructions; that *Stote Manby's* attorney might have told his counsel that the evidence was not sufficient, knowing himself that it was; but all depended upon the assumption that he had such knowledge: and his Honour observed, that it appeared to be clear that he could not have such knowledge; but that he had a case which was extremely difficult to support; and the natural and proper presumption was, that he thought the time was come at which a beneficial compromise might be made for his client.

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Then it was said, that the compromise itself was, upon the face of it, so monstrous, and the compensation for the relinquishment of *Stote Manby's* claim was so inadequate, that it shocked the conscience. That proceeded upon the assumption that there was no doubt about the right after the first verdict. It was argued, that, after that verdict, *Stote Manby* ought to have had at least half the property, because the chances of success in the second trial should be considered as equal. But his Honour said, that he had no means of judging of this. And this question arose upon this part of the case: if *Harvey* was inclined to defraud his client, and had so good a chance of success, why should he sell that chance for so little, for he only took 1500*l.* to cover the whole of his costs. On the face of the order of Court made upon the compromise, there was nothing bearing the slightest appearance of fraud or contrivance. Considering that the 1500*l.* was to cover the costs of the real action, and also of the ejectment which had been previously tried; and

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in the Plaintiff's favour; but the question to be principally compromised was fraudulent at the trial of that action. It appeared from the issue at the trial of that action that the agreement was made by or thirty witnesses agree, which depended entirely upon the declarations of of deceased persons. The agreement, beside the witnesses habit of observing upon the question of insanity, it money; and although, from the fact that the payment of 1500*l.* admitted, it was never the expenses, when he had secured ment and caution that the payment was so extravagant that it must evidence was to be of fraud. There was some evidence ally, upon the surveyor's bills of costs against *Stote Manby* this trial it was about 1066*l.* *Bewicke* and *Craster* were paying, clarations, 1500*l.*, a perpetual annuity of 300*l.*, which been made to be worth 6000*l.* or 7000*l.*; and there was jury upon the face of the transaction to enable the Court mon or to suspect that it was anything but a bonâ fide wo arrangement, as far as *Bewicke* and *Craster* were concerned, of the dispute between them and *Stote Manby*. Indeed, if they had been contriving a fraud, it was not likely that they would put upon the face of the agreement that 1500*l.* was to be paid to the attorney, or should agree to charge the estates with 300*l.* a-year, which would keep up the connection between the estate and the claimants, and give notice of the whole transaction to every one who might become entitled to the annuity. With respect to the subsequent transactions, his Honour observed, that there was not, even now that full discovery had been obtained in this suit, the slightest evidence that *Bewicke* or *Craster*, or their successors, ever knew of the certificate now produced as evidence of the marriage of *Ann Stote* and *William Manby*, or of her having had any issue.

Then the refusal of the parties to accept the annuity in the first instance had been relied on, and it had been argued that this should have made *Bewicke* and *Craster* aware that some fraud had been perpetrated; but it was by no means

who had settled a litigation by compromise, dissatisfied with the arrangement, attempted to re-adjust the matter. Measures in the deeds, executed in pursuance of the compromise, which occurred in the date of the compromise, and the arrears of the annuity; both of which were paid by the lapse of time between the execution of these deeds.

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Observation made was, that *Stote Manby* did not release his rights, but conveyed the estates to *Bewicke* and *Craster* by lease and release, which it was said was an admission of his title; but this is the universal practice in all such compromises. The usual course is, that the compromise is recited, and the party conveys in pursuance of it, so as to pass whatever interest he may have, if any; and no one ever dreams that this is any admission of the rights of the conveying party.

If there had been any fraud, another opportunity of reconsidering the matter was afforded to the Plaintiff's ancestors in 1786, when, in consequence of a mistake in the date, they were called upon to execute fresh deeds of conveyance to *Bewicke* and *Craster*.

As to the argument founded upon *Harvey's* obtaining £100l. a-year, part of the annuity, from his client, in 1783, this was open to considerable observation as to *Harvey's* share in the matter. However, even if *Bewicke* and *Craster* were aware of it, it would not be a ground for presuming that the compromise was fraudulent; but there was no evidence that they knew anything of the matter, except that at a later period their agent paid to *Harvey* one-third of the annuity.

His Honour remarked, that there was nothing to con-

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nect *Bewicke* and *Craster* in any manner with the subsequent dealings with the annuity by which the remaining 200*l.* a-year was apportioned between *Stote Manby* and other members of his family ; and he then continued —]

Then there remains the point on which much stress has been laid, namely, the dealing of *Bewicke* and *Craster* with *Stote Manby* and his son *William Manby*, both of them being, it is said, incompetent to manage their affairs—in other words, being lunatics—or, if not actual lunatics, in such a state of mind that *Bewicke* and *Craster* must have known that they were incompetent to manage their affairs. Now, how is any knowledge of this fact brought home to *Bewicke* and *Craster* ? I think there is some ground for the supposition, that they were aware that it had been asserted that *Stote Manby* was incompetent to manage his affairs, from the circumstance that *William Manby* was made to join in the agreement for compromise. This was not a very remarkable or uncommon thing in a transaction of that kind, he being the next heir to the property. Probably, however, there was some slight evidence to shew there might be such a weakness of mind on the part of *Stote Manby*, as to render it difficult to deal with him alone. It is impossible to assume more than that. I have heard none of the Defendants' evidence, and there is a good deal to be said against the assumption that *Bewicke* and *Craster* had any knowledge of the kind. What they did know was, that it had been asserted that he had been of weak mind from the kick of a horse from the time he was ten years of age—which is manifestly untrue, because the evidence now before me is, that he did not receive that kick till he must have been at least forty—and they knew that there was an allegation of insanity, which had failed. It was recited in the order made at the trial, that *William Manby* was there in Court ; and how is it to be assumed that he was not, at this remote period, when it may be

difficult to prove that he was there by any other evidence. I must take that recital to be true until it is disproved, which has not been done. It is possible, that joining the son in the agreement in this way might have excited suspicion, if *Stote Manby* was a person with whom it was difficult to enter into the arrangement alone. Even if it were so, is the proposition maintainable, that, whenever a suit is instituted on behalf of a person who is certainly not lunatic but of weak mind, employing an attorney in order to recover a large property, the Defendants are utterly incapable of treating with such a person for a compromise of the litigation. In this case, there was no time to be lost. One trial was over, the jury were sworn in the next, and the Defendants were desirous to make the best arrangement they could between themselves and *Manby* to bring the matter to a conclusion. They seem to have said, and supposing that they knew *Stote Manby* to be not of strong mind, what better course could they take than to say, "Here is his eldest son in Court who concurs in this arrangement, and thinks it beneficial for his father; and we are willing to compromise the litigation, and we engage to do so upon having the concurrence both of *Stote Manby* and *William Manby* his son." With respect to the mental condition of *Stote Manby*, it must be remembered, that he married again in 1783, which was after this transaction. Of course, if he was at all times incompetent to contract marriage, the Plaintiff's case must fail altogether, because he claims as issue of *Stote Manby*. Then the next thing we find is, that, in 1785, *Stote Manby* made a will. I am not only, therefore, asked to charge the memory of Mr. *Heron*, the solicitor of *Bewicke* and *Craster*, and Messrs. *Bewicke* and *Craster* themselves, and Mr. *Harvey*, the solicitor of *Stote Manby*, with what has been called in the argument an appalling fraud; but I am asked, also, to hold guilty of the like fraud those who prepared the will of this notorious lunatic, for such he is represented to have been in the latter part of

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his life by the evidence of the witnesses for the Plaintiff in this suit, notwithstanding that it was a will under which his property was enjoyed ever afterwards, by which he derived the perpetual annuity of 20*l.* a year, which was worth something to a person in his situation of life, and although by this will he disinherited his son *William*, who had got the annuity of 100*l.* a-year, and disposed of his property in favour of other persons, who appear to have enjoyed it under the devise to them; and although this will appears to have been properly attested by three witnesses, I am asked now to declare, that the person who prepared this will, and the persons also, who attested it, were guilty of the abominable fraud and gross immorality of preparing and attesting the will of a drivelling idiot, for that is the state in which the evidence now represents him to have been. Nothing is brought home to the knowledge of *Bewicke* and *Craster*, except that at the previous trial there was an allegation of the lunacy of *Stote Manby*, which failed; and at the pending trial, when the question of lunacy would not be in issue at all, they seem to have concurred with *Stote Manby* and his son in a compromise of the matter. Then it is said, that in this state of things, if *Stote Manby* himself had been alive, he would have been able to set aside this arrangement. It is just possible, if he had been proved to be in such a state of idiocy as to be unfit to contract, that the arrangement might have been set aside as fraudulent. Of course, if he was incompetent to act, the deed must be void; and if this deed had been avoided by the Court, the whole matter would have been remitted to the agreement; and then there would have been a difficult question whether or not *Stote Manby* might set aside that agreement, (I am now pursuing a number of phantoms rather than questions really arising in the case), and a reference might have been directed to inquire whether or not that agreement was beneficial to *Stote Manby*, and I am not clear what the result of that might have been. That is the utmost that could have been

done; and it does not at all touch the question of fraud which I am now considering. But, that the agreement can be set aside at this distance of time is a proposition impossible to sustain, if the fraud be not clearly proved. I have said all that it appears to me necessary to say, with reference to *Stote Manby*, with the exception that he appears to have been a marksman. *Bewicke* and *Craster* do not appear to have known anything of him, except that he was a man in very humble life, who had been brought forward to make the claim, and that, perhaps, might be one of the reasons that made them think the claim could not be sustained.

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As the counsel for the Plaintiff have observed, the story of *Ann Stote* eloping with a baker, having relations moving in such a very different class of society, and that circumstance having been so long kept secret from all the family, is more like romance than reality. But it does not appear to me, if *Stote Manby* himself were now alive, if he had lived to the patriarchal age which the two witnesses seem to have attained, and if he were now asking for an inquiry from the Court, that more could have been done, than to inquire simply whether or not the compromise was for his benefit. There is nothing, as it seems to me, to warrant the supposition that he was incapable of consenting to a compromise, without first having a commission of lunacy issued against him. To come to such a conclusion as that, instead of protecting rights, would be destructive of the best interests of parties who may be engaged in litigation, and may be willing to escape from it by coming to such an arrangement as I have described.

Then comes the question as to *William Manby*, and there is not, from the beginning to the end of the Plaintiff's case, the slightest intimation of knowledge on the part of *Bewicke* and *Craster* that he was a person insane, or of a doubtful state of mind. The manner in which this part of the case is put is very remarkable. *William Manby* was

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thirty-four years old at the date of the compromise, and he lived for twenty-nine years afterwards. It is through that *William Manby* that the Plaintiff now claims. Now the Plaintiff in the seventh paragraph of his bill tells us, that *William Manby* was in this condition: "from his childhood he was dull of understanding. The said *William Manby* intermarried with *Sarah Brocklebank*, the Plaintiff's mother, some time in the year 1790; and subsequently thereto," we can easily see why that is so stated—"but before the death of his father, the said *Stote Manby* became utterly imbecile; and from that period down to his decease he was of unsound mind, and wholly unable to perform any business requiring the slightest mental capacity." The issue, therefore, which the Plaintiff comes to prove, is that at the date of the compromise *William Manby* was a person of dull mind; but to say that a person of dull mind may not have an attorney to act for him, and to come to an agreement on his behalf, in the absence of fraud on the face of the agreement, would be a proposition too startling to be listened to for a moment. On that weak part of the case, there is no allegation that the Defendants are called upon to meet. Evidence has been attempted to be given, to shew that *William Manby* has been at all times what the witnesses call silly, and that he had the name of "Silly Billy," or some name of that description given to him by the children of the village at some later period. I am not saying that I disbelieve the evidence of these witnesses, so far as they speak to facts within their own knowledge and of recent date; but nothing is more common than for witnesses who have seen the early period of an old man's career, and have known him for some forty or fifty years of his life, to mix up in their recollection the state of mind in which they last saw him, with the state of mind he may have been in at the period of their first knowledge of him. The conclusion to which I come from their evidence is this: There is the evidence of witness after witness, that this man

became much worse from year to year; and I am now inquiring in what state of mind he was twenty-nine years before his death. Again, there is the evidence of many witnesses that he drank very much; and that this drinking should take place after he got the annuity of 100*l.* a year to a larger extent than before, is exceedingly probable. Therefore, it is perfectly consistent with that evidence, that he may have been a man of what is called dull mind, but nothing more, at the time when the compromise was entered into; and that, from the time when he got the 100*l.* a year to spend, he may have become worse and worse, by giving himself up still more to drinking habits; and that he thus rendered himself the laughing stock of the whole town of *Louth*, and ultimately died in a deplorable state of weakness of mind.

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However, although I make these observations, I do not omit to bear in mind the mode in which this man was left to deal with his property afterwards, in which there is one circumstance, not very important, but which helps to throw some light on the state of *William Manby's* intellect. There is an aged witness, named *Pawson*, who is said to be 105 years old, which, for the purpose of the question before the Court, I assume him to be, though very often people do not know their own ages correctly. This witness says, that he remembers *William Manby* after this transaction building some houses with the proceeds of the property he had thus acquired. That is not like the act of a man entirely non compos, and unable to take any steps on his own behalf. This comes from a witness favourable, at all events in his view and in the impressions on his mind, to the Plaintiff's case. He says that *William Manby* was always a person of very weak mind. Besides that, it appears that *William Manby* married in 1790; and the Plaintiff says, that he had not then arrived at that state of imbecility into which he subsequently fell; because the Plaintiff must, of course, make him out to have been sane at that period, in

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thirty-four years old at the date of of which the Plaintiff lived for twenty-nine years after as nine or ten years after *William Manby* that the Plaintiff. But the case does not Plaintiff in the seventh part that *William Manby* subse- *William Manby* was in duty; he mortgaged it, people lent he was dull of understanding; her solicitors must have been employ- intermarried with sons; they must have seen and had refer- ther, some time in ; and he ended by selling to *Mary Gray* we can easily annuity. She only gave eighteen years pur- death of his is said, than it was worth; but, after all, that imbecile: surprising, in the case of a person, who, it is said, of unse- actually degrading himself. Then, again, all these ness being in force, he at last made his will, just as his th- predecessor had done; and under that will the property was enjoyed in the first place by his wife, and then by his chil- dren, by his eldest son, to whom it went at twenty-one, and then, subsequently, it was wholly disposed of. Therefore, how are the descendants of *Bewicke* and *Craster* to be told now, "The agreement entered into by our ancestor *William Manby* with your ancestor, under which our ancestor has enjoyed, by subsequent proceedings with his father, 100*l.* a- year himself for a period of twenty-nine years, which prop- erty he has mortgaged, and to part of which, namely, 20*l.* a-year he was absolutely entitled at the period of his death, and disposed of by his will, shall now be set aside." As far as I can see, *Bewicke* and *Craster* did not know of the deeds by which the annuity was divided among *Stole Manby's* family; but if they did know of these deeds there is nothing to impeach the transaction of the original com- promise; such knowledge, if they had it, would only lead them to suppose that *William Manby* was a man who suf- ficiently took care of his own interests, inasmuch as he secured a third part of the annuity to himself.

Thus far I have only been dealing with the question of whether there is fraud or not in the transaction. It appears

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There is not the slightest reason whatever for
 I believe the compromise to have been a
 at the time, and I also believe it to
 compromise; and I must say, as far as I
 ence in this case, it was quite as pos-
 this compromise, *Bewicke* and *Craster*
 covered evidence of the claim of *Stote Manby*
 ous on account of his illegitimacy, the marriage
 n *Stote* with *William Manby* never having been
 oved, as that the claimant should now, after a long search,
 have discovered that which, if produced at the trial, would
 of itself have had some weight and importance, namely, the
 certificate of the marriage of two persons named respectively
William Manby and *Ann Stote*, who, however, are not
 identified with the parties in question of those names. It
 appears to me, that, if in 1781 an inquisition of lunacy had
 been instituted against *Stote Manby*, and he had been found
 to be a lunatic, it is quite possible that the Court would
 have come to the conclusion that this compromise, which
 would secure 300*l.* a-year to him, was a beneficial arrange-
 ment, which ought not to be disturbed, looking at the evi-
 dence and the position of the parties.

Then, having come to the conclusion that there was no
 fraud, it is hardly necessary to notice the argument as to
 what is a concealed fraud, within the meaning of the section
 of the Statute of Limitations which has been referred to;
 but I have thought it right to consider that question, be-
 cause it would have been very important if I had brought
 my mind to the conclusion that the documents to which I
 have been referring, and the subsequent dealings, afforded
 evidence of fraud on the part of *Bewicke* and *Craster*. The
 fraud alleged in the bill is, "That, on the night before, or
 on the morning of the 17th day of November, 1781, before
 the cause respecting the said estates situate in the county
 of *Northumberland*, other than *Newcastle upon Tyne* afore-

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said, was called on, the said *Calverley Bewicke* and *Daniel Craster* fraudulently and collusively tampered with the said *Thomas Harvey*, the attorney of the said *Stote Manby*, and a bargain was actually made between the said *Calverley Bewicke* and *Daniel Craster* and the said *Thomas Harvey*, by which, in consideration of a very considerable sum of money as a bribe, paid by the said *Calverley Bewicke* and *Daniel Craster* to the said *Thomas Harvey*, as hereinafter mentioned, for his own use and benefit, the said *Calverley Bewicke* and *Daniel Craster* induced the said *Thomas Harvey* to betray the interest of the said *Stote Manby*, and to abandon the said last-mentioned action; and the said *Thomas Harvey*, on condition of such bribe, entered into an agreement with the said *Calverley Bewicke* and *Daniel Craster*, that the said *Stote Manby* should convey the whole of the said *Windsor* estates to them the said *Calverley Bewicke* and *Daniel Craster* and their heirs; and that it should be represented to the said Court, on the coming on of the said cause respecting the estates in the county of *Northumberland*, that a compromise had been made between the parties, in the terms of the order hereinafter mentioned." Then the bill states, that "such representations were in fact and under the circumstances aforesaid made;" and then that the order was made a rule of court; and then that "the said *Stote Manby* was wholly incompetent to give his assent to the said order, being at the time of unsound mind as aforesaid. The said *Thomas Harvey* was wholly unauthorised to enter into any such arrangement, or to consent to any such order; and the said *Calverley Bewicke* and *Daniel Craster*, well knew that the said *Thomas Harvey* had no such authority; and moreover, that at the time such arrangement was made as aforesaid, the said *Stote Manby* was incompetent to give his assent thereto." And then it is further charged, "that it is untruly alleged that the eldest son was present in court."

Now, in that state of things, it appeared to me, when this case came before me upon a demurrer to the bill (a), that if the present Plaintiff could make out that a large bribe had been paid to *Harvey*, the attorney; and that, in consideration of that bribe, *Harvey* had betrayed his client, it would be a case of concealed fraud within the statute. It is true, and I have some faint recollection of hearing it argued on the demurrer, that the statement in the bill is, that the bribe was to be paid "as hereinafter mentioned," which seems to carry on the payment by reference to the 1500*l.* mentioned in the agreement of compromise. But I apprehend, that, if there had been an entire agreement, as stated in the bill, between the parties before they came into court, not merely to do that which I have held to be a perfectly fair and bonâ fide transaction, as it appears on the face of the document, namely, to pay the attorney his costs, and a certain sum to *Stote Manby*, but if, anterior to coming into court on that occasion, *Bewicke* and *Craster*, well knowing the weakness of their case, had arranged with *Harvey* that this money should be paid as a bribe, I apprehend, that if such a secret transaction had been recently, for the first time, discovered (and, of course, I was bound on hearing the demurrer so to assume), that would clearly come within the definition of concealed fraud, and the case would then be governed by the doctrine of *Trevelyan v. Charter* (b), and *Lewis v. Thomas* (c), and other cases of that description. The case of *Trevelyan v. Charter* was this: an agent, knowing the value of an estate, which was very large, bought it from the person whose agent he was, at a much smaller sum than it was worth, and then sold portions of the estate for much more than he gave for it, and that transaction was after a long series of years set aside on the ground of fraud; and very properly, since the doctrine of this Court is, that no agent is allowed to pur-

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(a) A demurrer to the original bill had been allowed and leave to amend given. (b) 11 Cl. & F. 714. (c) 3 Hare, 26.

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chase from his principal without subjecting himself to the onus of proving the bona fides of the transaction; for he is bound to be prepared with that proof, at whatever period of time the transaction is questioned; and, however unhappy the consequences may be, those are the consequences of a well-established and sound rule of law.

So again in *Lewis v. Thomas(a)*, it was decided, that, if a man take a conveyance from a lunatic, which he keeps and acts upon as his title deed, nobody knowing of that conveyance, the donee holding the property under that conveyance until the fraud is discovered, a concealment exists to which this section of the statute is pointed.

I dissent entirely from the argument upon this part of the case, as regards the capacity of the individual who has been defrauded to discover the fraud. There are two very distinct propositions which the Court must bear in mind in construing the Statute of Limitations. The last statute gives the sanction of the Legislature to what I believe will be found to have been the previous doctrine of this Court, namely, that the bar produced by the statute would not arise in the case of a fraud concealed, until a reasonable opportunity had been given of discovering that fraud. The statute, to make that plain, has enacted in express terms that "in every case of a concealed fraud the right of any person to bring a suit in Equity for the recovery of any land or rent, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might have been, first known or discovered" (b). Now the same statute has the usual provision as to lunacy suspending the operation of its general enactments during the disability; so that the lunacy of a disseised person, at the time of his being disseised, takes the case out of the sta-

(a) 3 Hare, 26.

(b) 3 & 4 W. 4, c. 27, s. 26.

tute, and he has the protection of the lunacy during the period that it may subsequently exist. If, therefore, a Plaintiff in this Court relies upon lunacy, or successive lunacies, to prevent the bar of the statute, that is an intelligible ground on which relief may be given, upon a totally different provision of the statute from that which relates to concealed fraud; but if a Plaintiff comes to this Court, not on the ground of lunacy, but alleging that his predecessor in title or himself was or is in such a weak or infirm state of mind, that there was no possibility of his discovering a fraud committed upon him, that is a very different foundation for the claim; and, I apprehend, that it would be extremely difficult to contend, upon that ground, that the fraud could not have been discovered with due diligence. It appears to me difficult to maintain that there is any middle course. The Plaintiff, in such a case, must prove that the unsound state of mind on which he relies was absolute lunacy. If he proves anything short of that, I ask, how is it possible for this Court to determine, not whether there did exist such an unsound state of mind as to entitle the Plaintiff to have the benefit of those clauses of the statute which relate to lunacy, but whether there existed a state of mind not wholly unsound, but with only such a glimmering of sense in it as to disable the party from availing himself of the protection of the statute as being of unsound mind, and yet to entitle him to say, "I was of too unsound a mind to discover this fraud, and therefore the fraud was a concealed fraud against me." The case would be one of extreme nicety, and excessively difficult to adjust, and, I apprehend, the Court would hesitate very much, and be long in coming to the conclusion, that a man whose mind was not so unsound as that he could avail himself of that portion of the statute that would protect him on the ground of lunacy, could be just of that degree of intellect, that, being incapable of acting for himself, he should be relieved by this Court against his own act done long ago,

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because he was in a condition in which it could not be supposed possible that he should exercise such a reasonable diligence as might have discovered a fraud then committed upon him. The Court must arrive, I think, at one of two conclusions, either that the man was absolutely insane, or, if he had his reason, then, I think, the Court must hold, that he is not protected in respect of his condition of mind against the effect of the Statute of Limitations. The capacity or power of mind of every person may be said to differ more or less. But, unless the Court is prepared to weigh, for example, the capacity of a female's mind with respect to any similar arrangement affecting her interests, and the possibility of her forming a correct judgment on the subject; or to estimate in such a case the state of mind of an uneducated clown, and his opportunities of obtaining advice on the subject, and thus to open a field of the most wide and vague inquiry in every case, the only alternative, as it appears to me, is to hold the broad view, that, unless a Plaintiff is in such a condition of mind as to be protected by the previous exemption in the statute on the ground of actual lunacy, the condition of his mind will not protect him, and he will not be considered by the Court to be a person incapable of using that diligence, which all persons who can obtain advice can use, namely, such diligence as to enable him to sue for and to recover his rights.

I have considered this point a good deal before coming to this conclusion. Possibly a case may occur, in which there may be such a degree of imbecility of mind, not amounting to lunacy, as to make it a question of considerable importance and difficulty for the Court to determine. Without now saying what the result of such a case might be, I only state this to be my view of the general principle applicable to it. Even if *William Manby's* case were different from what it is, I am bound to say, with regard to it, I do not think it possible for the Plaintiff to make out anything con-

cerning his mental condition differing from what is stated in the Plaintiff's own bill; and according to that he was a man of dull mind; but to say he was in such a state of mind that he could not employ an attorney, or had not that degree of mental capacity, which with any reasonable diligence, during the twenty-nine years for which he lived after this transaction, would have led him to set aside this transaction if fraudulent, I think, is a proposition that it is impossible to maintain. My opinion is, that the Plaintiff has not proved that any fraud was committed; and further, that, if he had proved such a fraud as was alleged to be concealed, there was no concealment, for it is not shewn that *William Manby* was in such a state of mind that he could not have discovered the fraud. The hopeless part of the case, from the first, was the allegation of there being a concealed fraud in obtaining an agreement of compromise which was made a rule of court, was entered into after the jury were sworn, and was made in open court, and which, on the face of it, stated all that was to be done, namely, that 1500*l.* was to be paid to the attorney for his costs, which was done; that 300*l.* a-year was to be paid to the claimant, which was done; which certainly did not state that the attorney was to have 100*l.* a-year out of the annuity of 300*l.* (but that circumstance is not brought home to the knowledge of *Bewicke* and *Craster*); this document having been afterwards dealt with in many different ways, deeds having been executed in pursuance of the arrangement, bargains and sales enrolled in this Court; the subject matter of the agreement having been disposed of over and over again, wills having been made by the supposed defrauded parties on the footing of the agreement, under which their families have had benefits, and those wills having been acted upon ever since:—to say now that all these proceedings were frauds, which were concealed from one of the parties to the agreement, because he and his descendant, though not insane, had not capacity of mind to discover the frauds,

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seems to me one of the strongest, and, I may venture to add, one of the strangest propositions that I have ever heard asserted in a Court of justice.

There is another observation, which was made in the argument for the Plaintiff, which I ought to notice in justice to the Defendants, as I have not heard their counsel. The counsel for the Plaintiff have said, that, whatever may be the result of the principles of law in this case with reference to the staleness of the demand, at least the persons in possession of the property have now learnt that they are not the rightful owners, but that one who is languishing in poverty has been deprived of his inheritance by those who have preceded them; and that, at all events, if they still enjoy the property, it must be with the consciousness that they are in the enjoyment of what does not belong to them. I beg to say, that I do not take at all that view of the case. I will even assume, for this purpose, that the document now discovered, the certificate of the marriage of a *William Manby* with an *Ann Stots*, would have persuaded a jury, or ought to persuade me, that the pedigree of the Plaintiff, as heir of *Dorothy Windsor*, has been established; and I think I may go so far as to say that it considerably assists the present Plaintiff in making out his alleged pedigree. It would not be right to say, that it establishes that pedigree without having heard the counsel on the other side. I cannot say that I have come to any conclusion upon it, and it is not necessary for me to do so, because that document, which would be the only document that ought to have had weight with *Bewicke* and *Craster*, in considering the case with reference to a compromise, was not before them when the compromise was made. What then is the result? It is simply this, that those who in the year 1780 had possession of the property, who had been in such possession for twenty-three years, find an obscure claimant rising up, who was incapable in their judgment of

establishing his case, and who, to the best of their judgment, was not a legitimate descendant of the lady from whom the property was derived; they at that time entered into a compromise with him and his attorney who represented him; they gave him a considerable sum of money, and liberated him from the payment of all costs; and they agreed to pay him 300*l.* a-year in respect of his claim, which, as it seems to me, was then a claim of an extremely doubtful character. What would any one have said of them, if, after having entered into that contract, they had discovered by some accident clear and convincing proof of the bastardy of the claimant, and had thereupon taken proceedings to recover back that which had been paid as the consideration for the relinquishment of the claim. If they had discovered conclusive proof of the claim having been fabricated, no doubt a moral right would have arisen in them to rescind the contract. But, to take the case simply of discovering additional evidence, each party believing at the time that the claimant had produced the best evidence that could be produced of his right, one party being of opinion that such evidence, though it had satisfied one jury, might fail to satisfy another, the other party being of opinion that there was no case at all that in fact ought to have satisfied any jury; that they then came to a deliberate and solemn engagement, and the Defendants in that litigation purchased the right of the Plaintiff for a considerable sum of money—what, I say, would have been said of those Defendants, if afterwards, on a discovery that the evidence was different from that which they expected, and that they in truth had spent some 6000*l.* or 7000*l.* for the purchase of that which was not worth one farthing, inasmuch as the Plaintiff had no right at all, they had sought to set aside the contract? Nobody can say that such a proceeding would not have been extremely immoral in every sense. It appears to me that the ancestors of the present Plaintiff, by that compromise, acquired a large

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benefit on very slender evidence; and that they held and enjoyed it for a long period of years, without any question being raised in respect of it, and, so far as I can see, without their having any possible means of establishing their case to the satisfaction of any jury, beyond what I have described, which was of an extremely doubtful character. I am therefore of opinion, that no principle of morality or of justice now requires that a contract of that kind should be rescinded at this interval, of some seventy-five years since the period when it was fairly, and as I believe honourably, entered into on both sides. I cannot come to any other conclusion; and I conceive that the present Plaintiff has been very unfortunate in attempting to set up claims of this very stale character after a contract had been thus concluded, and without any shadow of pretence that I can see for casting imputations on persons long since in their graves, which can hardly rest with them, but which must affect the character of every one who has been concerned from that time to the present in the preparation of deeds, assurances, wills, and other documents under which this property has been dealt with. So far from feeling that this is a case in which the statute has operated as any hardship to the claimant who fails in his litigation, I think it is just one of the cases which shews how beneficial this statute is, and how undesirable it is, even for claimants themselves, that they should nurture these strange and vague expectations eighty or ninety years after the supposed right which they claim first accrued, and when they find themselves, by the prodigality of those who have preceded them, deprived of the fruits reaped by their ancestors from the compromise of a litigation concerning such supposed rights; and that they should set up these stale and antiquated demands, and attempt to establish them in a manner so utterly reckless as in this case, by charging wholesale fraud of the grossest and most revolting character; whereas, when the matter is sifted, and the Court can fairly place itself in the position

In which these parties were placed in the year 1781, which it seldom has the advantage of doing so completely as in this case, the transaction, instead of being such as is described, is shewn to be one of the most ordinary description in cases of litigation depending on a disputed pedigree. I believe thoroughly that the parties have had the full and complete enjoyment of all that was ever contemplated by any of them, or by those who acted either on their behalf or in the ratification of their acts.

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The bill must, therefore, be dismissed with costs.

IN THE MATTER OF THEED'S SETTLEMENT;

Feb. 28th,
March 9th.

IN THE MATTER OF THE TRUSTEE RELIEF ACT.

THIS was a petition under the Trustee Relief Act for payment out of court of a sum of 1251*l.* 4*s.* 11*d.*, being the balance of the proceeds of the sale of land directed to be sold, and the trusts of which were declared, by an indenture dated 1797, as follows: viz the proceeds were to be invested in stock and held upon trust for *Henry Theed* during his life, and upon further trust after his decease to pay or transfer all the said stock then remaining unapplied and undisposed of under certain previous trusts, unto all and every the children and child of the body of the said *Henry Theed*, in equal shares and parts, at their respective ages of twenty-

Settlement—
Construction—
Vesting—
Younger Children.

—
A limitation by settlement of a fund vested in trustees, upon trust, to pay the income to *M.* for life, and at her death "to pay or transfer the capital to all her children (except

her eldest or only son) in equal shares at their respective ages of twenty-one years," confers a vested interest on all the children of *M.* who attain twenty-one, although they may die before the period of division.

A younger son attained twenty-one, and then became the eldest by the death of his elder brother before the period of division:—*Held*, that, as there was no reason shown by the settlement for excluding the eldest son, such as his accession to another estate, the share that was vested in the younger son was not divested by his becoming the eldest.

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one years. And if no such child should live to attain that age, then upon trust to pay the clear yearly dividends of the said stock unto *Mary Ann Macaulay*, sister of the said *Henry Theed*, during her life, for her own use, benefit, and disposal; "And at her decease to pay or transfer all the said then remaining stock unto all the children of the said *Mary Ann Macaulay* (except her eldest or only son) in equal shares and parts, at their respective ages of twenty-one years; and if there should happen to be only one such child, and that child to be a son living at the death of the said *Mary Ann Macaulay*, then and in such case to pay or transfer all the said stock then remaining unapplied and undisposed of for the purposes aforesaid, unto all the children of *George Mackenzie Macaulay*, the husband of the said *Mary Ann Macaulay*, by *Ann* his first wife, that should be at that time living, share and share alike."

There was no provision made by this settlement for the eldest or only son of *Mary Ann Macaulay*, nor did it shew any reason for excepting such son from the benefit of this trust.

Mary Ann Macaulay had five children, all of whom were living at the date of the indenture of settlement, viz. three sons, *George*, *William*, and *Urry*, and two daughters. *William* died in her lifetime an infant aged thirteen years, and intestate. Her other children all attained twenty-one in her lifetime, and survived her.

Mary Ann Macaulay died in 1847; *George* (her eldest son) in 1854, and *Henry Theed* in 1856, without issue.

The daughters now presented petitions to have the construction of the settlement declared as regarded the division of the fund in court, and for payment of their shares.

Mr. *T. Stevens* for the petitioners :—

Upon the true construction of the settlement, the petitioners are entitled to the whole of the fund in question in equal moieties; for *George* was excluded as being the eldest son, and *Urry* as being the eldest son living at the death of *Henry Theed*, the surviving tenant for life. And *William*, who died an infant and in the lifetime of both tenants for life, could take no vested interest.

Mr. *Faber*, for *Urry Macaulay*, contended that he was entitled to share equally with his sisters in the fund.

His eldest brother *George* had attained twenty-one; *George*, therefore, and *George* only, was excluded by force of the clause "except her eldest or only son."

But if that was not the time for ascertaining who was an eldest son within the meaning of the clause of exclusion, the question must at least be set at rest at the death of *Mary Ann Macaulay*, as was clear from the terms of the gift over; and at her death *Urry* was still a younger son.

He cited *Matthews v. Paul* (a).

Mr. *Vaughan Johnson*, for the trustee, submitted, whether *William Macaulay*, who died an infant in his mother's lifetime, and was not represented, did not take a vested interest in the fund; and cited *Gordon v. Raynes* (b), *Gordon v. Levi* (c), and *Butcher v. Butcher* (d), to shew that where there is in a settlement a limitation to trustees, upon trust to pay or transfer to all children equally at twenty-one, or to all except an eldest son at that age, the shares vest as the children come into existence, subject only to be varied in amount by the births of future children (e).

(a) 2 Wils. C.C. 64; 3 Swanst. 328.

(b) 3 P. Wms. 137.

(c) 1 Amb. 364.

(d) 9 Ves. 382.

(e) Per Lord *Eldon* in *Butcher v. Butcher*, 9 Ves. 382.

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The rule, which postpones vesting till twenty-one, where there is no gift of the fund except what is contained in the direction to pay at that age, was applicable to wills; whereas this was a settlement; and even in the case of wills, that rule had been held inapplicable where a trust intervened, and where, as here, the limitation in question was preceded by estates for life.

The absence of any provision for the event of there being no child of *Mary Ann Macaulay*, was accounted for, if children in existence, though under age at the date of the settlement, were intended to take an immediate vested interest.

Mr. T. Stevens, in reply, cited *Hynes v. Redington* (a).

The VICE-CHANCELLOR reserved judgment.

March 9th. VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

Two questions were argued in this case:—First, whether the infant child who has died, and whose representative is not before the Court, acquired a vested interest; and secondly, whether the son, who, at the death of his mother the tenant for life, was the second son, but has since her death become the eldest, is an eldest son within the meaning of the exception.

With respect to the first question, I think that the gift vested in those children who attained twenty-one, and in them only; and therefore I do not consider it necessary that the representatives of the deceased child, who died an infant, should be before the Court.

(a) Ll. & G. temp. Lord *Plunkett*, p. 33.

It is now settled by authority, that a gift, by a direction to pay and divide merely, does not of itself imply that the subject of the gift is not to vest until the period of division. The question in all such cases is, whether the period of division is postponed on account of previous interests in the fund, which are given to other persons in the meantime, or on account of some qualification attached to the donee. In the former case, the deferred interest vests upon the death of the testator, or the execution of the settlement, as the case may be; in the latter, it is contingent. In *Leeming v. Skerratt* (a), Vice-Chancellor Wigram examines the authorities, which lead to this result. In this case, if the direction had been, at the death of the tenant for life, to pay and divide the fund to and among the other cestui que trusts simply, their interests would have vested on the execution of the settlement, or on their respective births, if born afterwards, because the postponement of the division would only have been on account of the life interest previously given; but the superadded words, that the division is to be on the children attaining twenty-one, have no reference to anything excepting their personal qualification by arriving at that age. *Scott v. Bargeman* (b) and *Skey v. Barnes* (c), in which the former case is approved, are authorities that a gift in such terms is contingent until the legatees attain twenty-one.

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With regard to the second question, it appears that *Mary Ann Macaulay* left two sons who both attained twenty-one, and a share of the trust fund vested in the second; and then, the elder of these two sons having died before the time for payment, though not before the vesting of the share of the second son, a question has arisen whether or not the second son has become the eldest within the meaning of the exception in this settlement. The obser-

(a) 2 Hare, 14.

(b) 2 P. Wms. 68.

(c) 3 Mer. 335.

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—
Judgment.

ventions of Sir *Thomas Plumer* in *Matthews v. Paul* (a) were made with respect to limitations in a settlement. If a provision is made for the eldest son, and then other benefits are given to the younger children, the intention is taken to be, that the person who becomes entitled to the provision intended for the eldest son shall not take any part of the benefits provided for the younger children, although, at the time when such interests vested, he was one of such younger children; and, conversely, it is held that a younger child who becomes the eldest, although strictly excluded from sharing in the benefits provided for younger children, yet if he does not take the provision made for the eldest son, by reason of its having been disposed of by his elder brother in his lifetime, is not treated as the eldest son, so as to be excluded from taking his share with the younger children.

But there is nothing on the face of this settlement to shew for what reason this exception, excluding the eldest son, was made, and therefore the question must be determined by the period at which the interests vested. In *Matthews v. Paul* (a), Sir *Thomas Plumer* held that the gift was not vested until the younger child became the eldest, and he then said, what was the key to his whole judgment, that, in gifts to classes, the period of vesting was to be taken both for the purpose of ascertaining the class and also for the purpose of exclusion; and upon that principle he held that the younger son, who had become the eldest, was excluded. In *Livesey v. Livesey* (b) it was held, that a younger son who had become the eldest was excluded by a similar exception, although in that case a small legacy only was given in the beginning of the will to the eldest son, because he would have a handsome provision from another source. The eldest son obtained this pro-

(a) 2 Wils. C. C. 64; 3 Swanst. 328.

(b) 2 H. L. Ca. 419.

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 —————
In re
THEED'S
SETTLEMENT.
 —————
Judgment.

vision and died, having disposed of it; and the younger son, at the time when he became the eldest, had not taken any of this provision, and therefore an attempt was made to obtain for him a share of the residue, which was given to the children of *E.* the mother of the claimant, except her eldest son or such of her sons as should by the death of an elder brother become an eldest son, it being the testator's will that the son who was or should become an eldest son should not be entitled to take anything under that bequest. But the Court held, that, although there was provision made from another source for *E.*'s eldest son, and the claimant took no part of that provision, yet that such provision was not the reason for the exclusion, for, by a subsequent clause in the will, the eldest daughter was also excluded, and the clause of exclusion in the will had no reference to the fact of the person to be excluded taking other property, and therefore the period of vesting was alone to be regarded, a principle of construction which had an unfortunate effect for the interest of the younger son in that case. But if the Court had thought that the reason for the exclusion was that the elder son took some other estate, they would probably have come to a different decision.

In this case I have nothing to lead me to a conclusion except that the settlor has thought fit to exclude the eldest or only son. All the younger children except *William* took vested interests; and I am therefore of opinion that, *Urry* having a vested interest, it was not divested in consequence of his becoming the eldest son.

Therefore, the fund is divisible in thirds among the surviving children.

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*May 1st, 2nd,
4th, & 7th.**Husband and
Wife -Settle-
ment—**Separation
—Policy
of the Law.*

H. v. W.

Any agree-
ment made be-
fore or after
marriage,
which con-
templates a
voluntary se-
paration of
husband and
wife, is void as
contrary to
the policy of
the law.

By an ante-
nuptial settle-
ment, prop-
erty of the
husband was
limited during
the joint lives
of himself and
the wife, "if
she should so
long continue
to live with
him, and
should not
live separate
and apart from
him through
any fault of
her own," in
trust for the
separate use of
the wife, with-
out power of
anticipation;
and after the
decease of ei-
ther, "or in the
event of the wife living separate and apart from her husband through any such fault," for the survivor, or for the husband, as the case might be; and after the death of the survivor, "or in the event of the wife living separate and apart from her husband through any such fault as aforesaid," for the children of the marriage:—*Held*, that the limitations over upon the separation of the wife and husband were void as contrary to the policy of the law; for such a limitation in favour of the husband, if valid, would be a direct inducement to permit a state of separation, capriciously commenced by the wife, to continue.

BY an antenuptial settlement, dated in 1835, the intended husband, with the privity of his intended wife, covenanted, for himself, his heirs, executors, and administrators, with the trustees of the settlement, to convey to them any freehold or leasehold hereditaments to which he might become entitled under the marriage settlement of his father; and it was declared, that they should stand possessed thereof, upon trust, to sell the same as therein mentioned, and to hold the proceeds of such sale upon the usual trusts to invest the same, and during the joint lives of the intended husband and wife, "if she should so long continue to live with him, and should not live separate and apart from him through any fault of her own," to pay the income thereof to her for her separate use, without power of anticipation; and from and immediately after the decease of either of them, "or in the event of the said intended wife living separate and apart from her said intended husband through any such fault as aforesaid, then, from and immediately after the happening of such an event, upon trust," to permit the survivor, in case of death, and the intended husband and his assigns, "in the event of the said intended wife so living separate and apart from him as aforesaid," to receive the income for the rest of his or her life. And from and immediately after the decease of the survivor of them, the intended husband and wife, "or in the event of her living separate and apart from her said then intended husband through any such fault as aforesaid, then," as to all the trust property, upon trust for the chil-

dren of the marriage, as the intended husband should appoint, and in default in trust for the children of the marriage as tenants in common equally.

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v.
W.

The marriage was solemnised, and there was issue of it two children, who were infants.

Statement.

The wife left her husband in 1838, and continued thenceforward until his death to live apart from him.

In May, 1851, the husband died.

The bill in this suit was filed on behalf of one of the infant children against the widow, and the trustees of the settlement, and the other child, to have the trusts of the settlement carried into execution.

The question was, whether the widow was under the circumstances entitled to a life interest in the property.

The case was heard in private, but the judgment, not involving any statement of the evidence concerning the separation, was given in open Court.

Mr. *Rolt*, Q. C., and Mr. *Hallett*, for the Plaintiff.

Argument.

Mr. *Willcock*, Q. C., and Mr. *Roche*, for the trustees and the other infant child.

Mr. *Daniel*, Q. C., and Mr. *Greene*, for the widow.

Mr. *Cairns*, Q. C., and Mr. *Deere Salmon*, for other parties.

VICE-CHANCELLOR SIR WILLIAM PAGE WOOD:—

In this case I have come to the conclusion, that the

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Judgment.

limitation in the settlement, upon which the question has arisen, is inconsistent with the policy of the law.

It is not necessary to have the doors of the Court closed, because I shall not enter into the painful parts of the case, and therefore the public may be admitted.

[His Honour stated the effect of the settlement.]

The limitation over in favour of the children, after the decease of the survivor, or in the event of the wife living apart from the husband, is not very artistically framed. Of course, that could not be intended to be in derogation to the life interest given to the husband, supposing it was a limitation that the law would allow; but the intention was, that the property should go to the children on the death of the husband, in the event of her living so separate and apart.

The first thing I observe is, that there is a distinct limitation, during the joint lives, to pay the income into the proper hands of the wife, but with a condition attached to the payment, "if she shall so long continue to live with him, and shall not live separate and apart." Therefore, if that condition be invalid, and one that the policy of the law will not admit, the trustees are bound to pay the income to her during their joint lives freed from the condition. The case is stronger on the subsequent limitation. It stands thus:—After the death of the survivor, or if this event shall happen, the trustees are directed to pay over the whole fund in the event of the death of one to the survivor, or in the event of such a separation to the husband. Those are two distinct limitations, one of which I take, for the reasons I am about to assign, to be inoperative, as being contrary to the policy of the law; but the other, being a good limitation and entirely distinct, might take effect, while the alternate one might fail.

As to the policy of the law, the difficulty of the case is this:—If the limitation over had been on the wife committing adultery, I apprehend it would be impossible to say that such a limitation would be contrary to law. The Statute of Westminster has provided, that, in such cases, a wife shall forfeit her dower; and any objection founded upon the circumstance that the event upon which the limitation over is to take effect, is the commission of an illegal act, would be well answered by the argument which was used with reference to the condition in this case, namely, that it would not be impolitic, because it would only have a tendency to secure the due observance of conjugal duties. It is probable, as suggested, that some reason personal to the husband rendered it unsuitable to trust him with the whole income; and it has been argued, that, as it was thus necessary to limit the whole income to the intended wife for her separate use, it would be unreasonable that she should take the whole income if she were living apart from her husband and family, and that the purpose of the conditional limitation was to prevent this. But, whatever the object was, the effect is, that, in any event, upon her living apart, by her fault, the income would go to the husband. It is difficult to distinguish that from the case of *Cartwright v. Cartwright*(a). It was argued by the counsel for the widow, that it could not be the meaning of the settlement, that the husband might make the house intolerable to the wife, but that, if he did not proceed to such a length as to give her a lawful reason for absenting herself, the limitation over would take effect if she left him. I concur, however, in the view supported by the other side, that, leaving the husband without fault on the part of the wife, could only mean the separating for lawful reasons, which would entitle her to a divorce a mensâ et thoro, as for maltreatment or for adultery on the part of the husband.

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v.

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Judgment.

(a) 4 D. G. Mac. & G. 982.

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 {
 H.
 v.
 W.
 —
Judgment.

It is important to observe, that it is a limitation for the benefit of the husband if the wife lives apart from him through her own fault. You cannot say, if she leaves him without reasonable cause. The law does not recognise such a state of things. The wife cannot separate from her husband. The husband has a right to insist on the presence and the enjoyment of her society, and the law recognises no such thing as the wife living separately without lawful cause. The consequence then of holding this to be a good limitation would be, that it might induce the husband, if the wife left him through her own fault, to consent to her continuing to live apart from him, in order that he might be able to appropriate the life income, and for this reason he might refuse to take steps to enforce the restitution of conjugal rights. The policy of the law in such cases, for very good reasons, endeavours in the very highest degree to secure the observance of conjugal rights, as is shewn by *Westmeath v. Westmeath*(a), and other cases of that class. According to that policy, nothing can be permitted which contemplates the future separation of the husband and wife, where no just cause has been given to the wife for such separation, unless it be with the husband's consent. This case is really similar to *Cartwright v. Cartwright*, where there was a limitation by the husband's father for the separate use of the wife for life,—probably for the same reason that may be suspected here, namely, that it was not thought right to trust the husband with the disposal of the property. In that case, as here, there was annexed to the limitation for the separate use of the wife a proviso, that, in case a separation should take place by reason of disagreement or otherwise, the fund should go over to the husband. In this case, the separation contemplated might take place, not solely on account of criminal conduct on the part of the wife, but simply from her caprice in leaving the husband; and in either event, if such separation should

(a) 1 Dow & Clark, 519.

continue, the husband is to enjoy the income of the property. The condition of separation can only exist by his consent and agreement; and I am unable to distinguish this from the case of *Cartwright v Cartwright*.

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r.
W.
Judgment.

I have carefully read over the case of *Egerton v. Lord Brownlow*(a), which must be now a leading authority on questions relating to conditions; but without calling in aid any of the principles, which were pushed to a considerable length by that decision, it seems to me to be decided, that, by the policy of our law, no state of future separation can ever be contemplated (during the existence of coverture) by agreement made either before or after marriage. It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.

I cannot look on this limitation for the benefit of the husband in the event of the wife leaving him without cause, as otherwise than contrary to the policy of the law; because it would give to the husband a benefit by waiving his marital right, which, in the event of the wife leaving him capriciously, might induce him to consent to a continued separation, in order that he might enjoy this property instead of enforcing those rights which the law requires him to enforce, to preserve intact the marital contract.

The decree will be to carry into effect the trusts of the settlement; and there must be a declaration that the limitation over, in the event of the wife living separate and apart from her intended husband through any fault of her own, is void; and that the limitation to the survivor of the husband and wife took effect upon the death of the husband.

(a) 4 H. L. Ca. 1.

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DE LA RUE v. DICKINSON.

May 22nd.

*Pleading—
Exceptions to
Answer—Dis-
covery—Plea
—Patent
Suits.*

When Plaintiff's right to relief at the hearing is clear assuming the title stated by his bill, Defendant, by his answer denying that title, is, in certain cases, protected from discovery.

Thus, in a suit to restrain an alleged infringement of a patent, the Defendants by his answer denying the fact of infringement, is protected from making any discovery immaterial to that question, and which when that question is decided would be given under the decree.

And it is not necessary to set up a defence of this nature by plea.

THE bill sought an injunction to restrain an alleged infringement of the Plaintiff's patent for the manufacture of envelopes by means of machinery.

The Court, on a motion for an injunction, directed an action, which was tried, and resulted in a verdict for the Plaintiff, reserving certain questions of law.

In the meantime, the Defendants had put in an answer to the Plaintiff's interrogatories.

Those interrogatories sought, amongst other things—

An account of machines in the Defendants' possession, and a discovery from whom the same were procured, and whether they were purchased or hired, and, if purchased, as to the consideration for such purchase.

An account of envelopes manufactured by any machine used by the Defendants, and a discovery to whom such envelopes had been sold.

An account of the sales of such envelopes, and of the quantity of envelopes sold by the Defendants.

An account of the profits made by the Defendants by the use of the machines used by them; a discovery as to the stock of envelopes now in the possession of the Defendants manufactured by the said machines.

And an account of the sums of money received by and due to the Defendants for envelopes so manufactured.

The Defendants, by their answer, admitted that they had in their possession certain machines, which had been

used by them in the manufacture of envelopes; and that they had manufactured and sold large quantities of envelopes by the aid of such machines. But they denied that such machines, in principle or action, resembled those described in the Plaintiff's specification. And, therefore, submitted that they were not bound to answer the matters inquired after, as mentioned above.

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The Plaintiff took eight exceptions to the answer. The first seven referred to the interrogatories above mentioned; the eighth to the concluding interrogatory as to letters and documents, as to which the answer was clearly insufficient.

Mr. *Fooks*, in the absence of Mr. *Rolt*, Q. C., for the Plaintiff, contended, that if the defence were simply no infringement, it should have been set up by plea, not by answer; and the Defendants, having elected to answer, were bound to answer fully.

Argument.

Mr. *Cairns*, Q. C., and Mr. *Hawkins*, for the Defendants, adverted to the inconvenience, not to say impossibility, in patent cases, of raising a defence of this nature by plea, and asked the Court to order the exceptions to stand over until the hearing, as had been done by the Lords Justices in two recent and unreported cases, viz. *Ulegg v. Edmondson* (a), and *Greaves v. Neilson*. The discovery sought was wholly immaterial to the Plaintiff's title; the Defendants denied that title. If the Defendants were right, the discovery sought would be simply useless; if they were wrong, it would be time enough to grant the discovery when the Plaintiff's title had been established.

Mr. *Daniel*, Q. C., as amicus curiæ, stated that the Lords

(a) Originally heard at the Rolls, 2 Jur., N. S., 824, but reversed by the Lords Justices, see 3 Id. 299.

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 v.
 DICKINSON.
 —
Argument.

Justices had recently acted upon this principle in other cases, *e. g.* in *Swinburn v. Nelson* (a). A usual form of order with their Lordships was this: Let the Defendant have a month to answer after judgment at law.

Mr. *Fooks*, in reply, contended, that if this mode of answering were allowed, an executor, Defendant to an administration suit by a creditor, might simply deny that the Plaintiff was a creditor, and by that same denial protect himself from making any further discovery. At any rate, in all patent cases it would be useless, in future, to file any interrogatories at all.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The general question, *viz.* whether the Plaintiff is entitled to have an answer from the Defendants as to the matters comprised in the first seven exceptions, is one of very considerable importance.

The rule on which the Plaintiff relies, that a Defendant electing to answer must answer fully, is, no doubt, a rule sufficiently well established, and one which, as Mr. *Fooks* contends, has been acted upon in many cases with extreme rigour.

But the ground upon which that rule has always been based is this, that, even if the discovery should prove immaterial to the Plaintiff's title—as would clearly be the case in the present instance—still it may be important to the Plaintiff to have every information bearing upon his rights in this Court.

(a) Not reported.

In a patent case, if the Plaintiff once establishes the fact of infringement, his right to a decree involving full discovery of all matters in the nature of those here inquired after, is clear ; everything therefore shewing, or merely tending to shew, the fact of infringement, must, of course, be set forth in the answer, to the full extent of the interrogatories.

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DICKINSON.
Judgment.

But here, all the discovery required by the interrogatories in question *assumes* the fact of infringement, and will be obtained under the decree at the hearing, as a matter of course, provided the fact of infringement be then established. While, on the other hand, if that fact be not established at the hearing, the whole of the discovery required will be utterly immaterial, and very expensive to all parties, including the Plaintiff.

It is true, that the Defendant might have protected himself from putting in an answer, by a plea denying the fact of infringement. But the question is, whether he was bound so to plead ; and I am of opinion, that, even if such a plea were practicable, he was not so bound.

It was argued, that, if this mode of answering be allowed, it will be competent to an executor defendant to an administration suit by a creditor, to deny by his answer the fact that the Plaintiff is a creditor, and by that bare denial to protect himself from the necessity of making any further discovery. But, in a creditor's suit, there are many intermediate steps which it may be necessary to take, as to all of which an answer may be material. It may be necessary to have a receiver appointed, or to obtain an order for payment of money into court, or to take other similar steps. In a suit like the present, there is nothing of this sort. And it is clear, that the right course in such a case is that adopted, as Mr. Cairns assures me, by the Lords Justices,—although I do not find any actual report upon the subject,—

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 Judgment.

and reserve this question until the Plaintiff's right has been established at the hearing.

If, at the hearing, the Plaintiff's title to an injunction is clearly established, he will then be as clearly entitled to the whole of this discovery under the decree. But, even in that case, an answer will not be necessary, because, without an answer, the Plaintiff will obtain all he seeks, in the ordinary course of the inquiry in chambers.

If, at the hearing, his right is not clearly established, then, as I said before, the discovery sought will have been simply useless.

In this respect, *Clegg v. Edmondson* (a) is a case clearly in point; for, in that case, according to the final decision of the Lords Justices, the Plaintiff failed to establish his title. Consequently, had the discovery been granted in the earlier stage of the proceedings, the whole would have proved simply useless.

Equally in point are Lord *Cottenham's* observations in a case which came before him on this subject (b), where he says, "If a bill is filed by a person as a creditor, and he asks for all the title deeds of the real estate, is the Plaintiff entitled to see the title deeds of a person's estate because he calls himself a creditor, which the Defendant denies that he is?" Whatever may make out the Plaintiff's title, he may have a right to see; but documents not necessary to make out the Plaintiff's equity, he is not entitled to see. And the title deeds of the real estate would clearly, in the case supposed, be unnecessary for the purpose of making out the Plaintiff's equity.

In the present case, the Defendant may rely either on

(a) 3 Jur. N. S. 299.

(b) *Adams v. Fisher*, 3 My. & Cr. 526, 545, 546.

the ground of principle, or on the ground of immateriality; and on either ground he is equally relieved from answering.

Therefore, as to the first seven exceptions, I must direct them to stand over until the hearing. The eighth exception, and the costs of the eighth exception, must be allowed.

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DICKINSON.
Judgment.

STOCKER v. WEDDERBURN.

June 6th.

THE Plaintiff, being the owner of certain patents for the manufacture of a material to be used in making bottles and jars and similar articles, was desirous of forming a company to work such patents; and having induced certain persons to be promoters of such a company, on the 14th day of March, 1857, at a meeting between such parties, a preliminary agreement was signed, dated the 10th of March, 1857, which was as follows:—

Contract to form Joint-Stock Company—Specific Performance—Agreement with negative Term—Injunction.

The Plaintiff, being the owner of certain patents, entered into a written agreement with other persons to form a Joint stock Company for the purpose of working these patents, he agreeing on

“Preliminary Agreement.

“1. The several persons whose names are hereunto subscribed hereby agree to unite as members of a joint stock company, to be established and incorporated with limited liability under the the recent Act.

his part to sell the patents to the company upon certain terms, and to take all requisite measures for obtaining patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company:—*Held*, that the plaintiff could not obtain specific performance of this agreement against his co-promoters, because, from the nature of his own part of the agreement, the Court could not compel specific performance of it by him.

The difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in equity, is, that the Court could, at any time, upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction; but if in such a case as this the Court were to compel the Defendants to become a registered company, that could not afterwards be undone, if the Plaintiff were to fail in his part of the agreement.

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—
Statement.

" 2. The name of the company is to be, 'The Patent Corporated Mineral Company, Limited,' or such other name as may be agreed.

" 3. The registered office of the company shall be in England.

" 4. The objects of the company shall be the manufacture and sale of corporated mineral substances of all kinds.

" 5. The liability of the shareholders shall be limited.

" 6. The capital shall, in the first instance, consist of 7,000*l.*, divided into shares of 25*l.* each; but no member shall hold less than ten of such shares in the company.

" 7. Any special general meeting of the company called for that purpose shall have power, by vote of three-fourths of the shareholders present, to increase the capital of the company to any sum not exceeding 20,000*l.*

" 8. The undersigned *A. S. Stocker*, being possessed of an invention for incorporating mineral substances, and having already secured Letters Patent for the same for *Great Britain, France, and Belgium*, agrees that such invention and the said patents shall become the property of the company.

" 9. The consideration for such invention shall be as follows:

" A. The said *A. S. Stocker* shall receive for the same the several sums of cash hereinafter provided; and there shall be reserved and made payable to him during the continuance of the said patents a royalty of one-eighth of the profits which shall be earned by the working of the patent process by the company, such royalty to be settled at the time of declaring the dividends by the company, and payable with such dividends and in like manner thereto.

" B. The several sums of cash shall be paid as follows:

" C. The sum of 1,000*l.* out of the first moneys received from calls, and within one week after the incorporation of the company.

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 WEDDERBURN.
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"D. The further sum of 1000*l.* in two payments, viz. 500*l.* within four months of the incorporation of the company, and the balance at the end of a year, or sooner if practicable, such balance being contingent on the full amount of capital being subscribed and paid up.

"E. The further sum of 1,000*l.* so soon, within two years from the date of incorporation but not beyond, as the directors shall be satisfied that the patent process is actually earning to the company, as hereby formed, a profit of 25*l.* per centum per annum.

"F. The further sum of 1,000*l.* is to be retained and applied in payment up of the calls upon forty shares of 25*l.* each, which the said *A. S. Stocker* has agreed to take in the company.

"G. And if, within three years from the date of incorporation, the company shall be found to pay 100*l.* per centum per annum profit, then the said *A. S. Stocker* shall receive a further sum of 1,000*l.*

"10. The said *A. S. Stocker* engages to take any proceeding required of him by the company at the company's expense to obtain other patents in foreign countries, which patents shall belong to the company; and if an American patent be so obtained, the said *A. S. Stocker* shall, besides the one-eighth royalty before provided for, receive also one other one-eighth royalty from all profit derived from such patent.

"11. Mr. *Stocker's* plant and stock on hand to be purchased at a valuation, to be made, if necessary, by a valuer on each side, and payment to be made within six months of the date of the incorporation.

"12. The said *A. S. Stocker* agrees that he will, at the request of the company, and so long as the company shall desire, if not exceeding two years, devote his time to the manufacture of the patented production, and engage himself wholly for the company, to promote its interests in every

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possible way, and he will use all his skill in improvements in working the patent process; and he will not, during the existence of the company, be engaged in business of a similar nature to that thereby contemplated, without the written consent of three-fourths in number and value of the shareholders. Mr. *Stocker's* salary to be at the rate of 300*l.* per annum.

" 13. If Mr. *Stocker*, at any time during the continuance of the patents made over to this company, or any member of the company so long as he is a shareholder, discover or come to the knowledge of any improvement or new invention which shall be applicable to the patent process intended to be worked by this company, Mr. *Stocker* or such member shall be bound to impart and make over to the company such invention or improvement, but the company shall be bound to pay to such member a proper compensation for the same.

" 14. Until otherwise settled, all the shareholders shall be considered directors, and the affairs of the company shall be governed by them, and by committees to be appointed by them, until the number and qualification of directors shall be otherwise settled.

" 15. All or any of the directors who shall devote their time to the business of the company, shall be remunerated according to their services by the vote of such sum of money as shall be fixed by a general meeting.

" 16. No share in the company shall be transferred otherwise than to a shareholder, or to a person previously approved by the directors or an absolute majority of them; and as often as any shareholder shall propose to transfer any share or shares to any person or persons (not being a shareholder) as to whom an objection shall appear to exist, the director shall certify the fact of such objection, and the holder of such share may then propose some other transferee, or may call upon the directors to find within a month

another purchaser at a fair and proper price. But no share shall be transferred till after the expiration of one year from the incorporation of the company.

" 17. Any disputes arising out of any of the clauses in this agreement are to be settled by arbitration in the usual manner, and this agreement may be made a rule of the Court of Queen's Bench.

" 18. The present bankers of the company shall be the *London and Westminster*.

" 19. The general regulations of the company shall be such as may be agreed on by a majority of the subscribers, to be assembled in a general meeting previously to the incorporation of the company.

" Dated 13th March, 1857.

" ALEXANDER S. STOCKER.

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NAMES.	ADDRESSES.	NO. OF SHARES.
Thomas Garratt . . .	J. S. Club, Charles-st.	20
William Clarke . . .	Army & Navy Club .	20
Henry M'Manus . . .	6, Stockbr. ter., Pimlico .	20
John Osborne . . .	67, Eaton-pl., Belgravia .	10
Godfrey W. FitzHugh	Arthur's Club . . .	20
Francis Garratt . . .	Army & Navy Club .	20
John Hall . . .	Ladbroke-villas, Notting-hill	20-5000.
Alex. S. Stocker . . .	18, Wimpole-street . . .	40-10000.

Some of the same persons, (not including the Plaintiff) and also the Defendants, *Wedderburn* and *Barnett*, at a subsequent meeting, executed the following articles of association :—

" Limited Company.—Memorandum of Association of the Patent Corporated Mineral Company, Limited.

" 1. The name of the company is the Patent Corporated Mineral Company, Limited.

" 2. The registered office of the company is to be established in England.

" 3. The objects for which the company is established are

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the manufacture and sale of corporated mineral substances of all kinds.

" 4. The liability of the shareholders is limited.

" 5. The nominal capital of the company is 7000*l.*, divided into 280 shares of 25*l.* each. We, the several persons, whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names and Addresses of Subscribers.	No. of Shares Taken by Each Subscriber.
Francis Garratt, Army and Navy Club, Pall Mall	20
John Kellerman Wedderburn, Junior United Service Club, Charles-street, Regent-street - -	20
John Osborne, Junior United Service Club, Charles street, Regent-street - - - - -	10
Godfrey William FitzHugh, Arthur's Club, St. James'-street - - - - -	20
William Clarke, Army and Navy Club, St. James'-street - - - - -	20
Thomas Garratt, Junior United Service Club, Charles-street - - - - -	20
John Hall, 9, Ladbroke-villas, Notting Hill - -	20
E. Barnett, 30, Bryanstone-square - - -	20

" Articles of Association of the Patent Corporated Mineral Company, Limited.

" 1. No person shall be admitted on the register of the company as a shareholder, or remain a shareholder therein, unless he shall hold at least ten shares in the company.

" 2. No shareholder shall transfer his shares otherwise than to a shareholder in the company, or to a person previously approved by all the directors, or an absolute majority of them; and as often as any shareholder shall be prevented by an objection on the part of the directors from transfer-

ring any share or shares to any person who shall have purchased or be willing to purchase the same, he shall be at liberty to call upon and require the directors, within one calendar month, either to purchase such share or shares on behalf of the company, or to procure some other person, being a shareholder, or a person approved by a majority of the directors, to purchase and to take such shares at a fair and reasonable price.

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"3. The regulation of Table B of the Joint Stock Companies Act, 1856, as to increase of capital, numbered 20, shall not extend to authorise the increase of the company's capital so as to exceed 40,000*l.*, in the whole.

"4. The regulation of Table B as to votes of shareholders, numbered 38, shall not apply, and every shareholder shall have one vote in respect of every share he holds.

"5. The regulation of Table B as to disqualification of directors, numbered 47, shall be subject to the following additional exception, that no director shall vacate his office by reason of his acting as an attorney or solicitor on behalf of the company, or being concerned or participating in the profits of any business transacted by himself or his partner or partners in that capacity, or being manager of any part of the company's business, and receiving allowances for the same.

"6. The regulations of Table B as to rotation of directors, numbered 48 to 54, both inclusive, shall not apply. All the shareholders in the company for the time being, not expressly disqualified under the regulation of Table B, numbered 47, as modified by these articles, shall be directors, until regulations fixing the number, mode of election, term of office, and order of rotation of directors shall be adopted by an extraordinary general meeting.

"7. The regulation of Table B as to accounts, numbered 73, shall not apply.

"8. The regulations of Table B as to auditors, numbered

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74 to 84 both inclusive, shall not, in the first instance, apply.

" 9. Any shareholder who may discover or come into the possession or knowledge of any improvement or new invention in or connected with the manufacture of corporated mineral substances, and available for the purposes of this company, whether patented or otherwise, shall forthwith communicate the same to the company, and shall give to the company the option of becoming the absolute owners thereof, or of taking the exclusive or any partial use thereof, at the discretion of the company, on being paid such remuneration for what the company shall so take, as shall be fixed by the directors or settled by arbitration.

" 10. No shareholder shall, without the written consent of the majority of the other shareholders, be engaged in the manufacture or sale of corporate mineral substances of any kind, otherwise than in connection with the company.

" 11. Any dispute which may arise between any of the shareholders amongst themselves, arising out of the affairs of the company, shall be settled by arbitration in the usual manner."

Opinions of counsel were afterwards obtained favourable to the patents, but the parties seem to have doubted their validity; for, on the 26th of March, 1857, the majority of the original promoters signed a letter to the solicitor of the association, which was in the following terms:

" In consequence of the unfavourable report received of Mr. Stocker's patents, we think that we cannot properly be parties to forming the joint stock company contemplated for working them; we therefore now revoke our assent and signatures to the declaration and articles signed for the purpose of establishing such company, and beg you to consider this as a distinct intimation that the same are not to be made use of."

The solicitor, in consequence of this notice, refused to take the necessary steps for registering the company.

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The Plaintiff then filed this bill against all the promoters who had signed the agreement and the articles, other than himself, stating that the Plaintiff had incurred serious expense in preparing to be in readiness for commencing operations on behalf of the said company; and he had already received great detriment and injury in relation to his said patents, by the conduct of the Defendants in refusing to perform the said agreements, the title to his patents having been by such conduct put in jeopardy, for which any redress at law would be wholly inadequate; and charging, that, under the circumstances, the Defendants ought to be compelled specifically to perform the said agreement, and to pay the costs of the suit; and praying that the Defendants might be decreed specifically to perform the said agreement of the 13th of March, 1857, and for that purpose to take all such steps as might be necessary for the registration and incorporation of the said company, pursuant to and in accordance with the said memorandum and articles of association respectively, and to do all other necessary acts for carrying the said agreement and articles into full effect, the Plaintiff being ready and willing, and thereby offering, specifically to perform the same on his part.

The Defendants demurred.

Mr. Cairns, Q. C., and Mr. Cotton, for the demurrer:—

Argument.

First, the Court will not enforce part of this agreement only; because it is impossible that it should decree specific performance of all the terms of it. It cannot compel the Plaintiff to give his services to the company; nor can it oblige the Defendants to take all the numerous steps necessary to form the company.

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Secondly, it would, obviously, be very inadvisable to compel the formation of this company; because, if formed, it could not work, for the Defendants would decline to act as directors.

Then there is a perfect remedy for the Plaintiff at law, where he may recover damages for breach of the agreement, if he is entitled to any; and a jury would take into consideration the alleged depreciation of the patents, and all other injuries he may have sustained.

In *Hercy v. Birch* (a), it is laid down that the Court will not execute an agreement to form a partnership, when it may be dissolved immediately afterwards.

Mr. Rolt, Q. C., and Mr. W. Collins, for the bill :—

The bill has two objects—to have the company registered and to form the partnership. If either of these objects can be carried out by the Court, the bill must be sustained.

The Court will decree specific performance of an agreement to form a partnership: *Buxton v. Lister* (b); or of an agreement to pay money by instalments: *Adderley v. Dixon* (c); so, of an agreement which contemplates that something else should be done to perfect it: *Fenner v. Hepburn* (d). It is no objection that the Plaintiff's part of this agreement is such as the Court would not decree to be performed, because by his bill he offers to perform his part. This was the case in *Dietrichsen v. Cabburn* (e) *Lumley v. Wagner* (f), and *Hawkes v. Eastern Counties Railway Company* (g). In the note to *Crawshay v.*

(a) 9 Ves. 357.

(b) 3 Atk. 383.

(c) 1 S. & S. 607.

(d) 2 Y. & C. C. C. 159.

(e) 2 Phil. 52.

(f) 1 De G. M. & G. 604.

(g) 16 Jur. 1051.

Maule (a), it is stated that Lord *Eldon* was not satisfied with the decision in *Hercy v. Birch* (b).

The reply was not heard.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

It has been argued, that, where persons have entered into an agreement to execute a deed containing certain provisions, the Court will order the execution of such deed, without regard to the question whether or not its provisions are such as the Court can decree to be specifically performed ; and that it will in such cases consider it to be the substantial part of the agreement, that a deed should be executed so as to vest in the parties the legal rights which they have mutually agreed to confer. I concur in this view. If, in this case, one term of the agreement had been for the execution of a deed containing the same provisions as are contained in the agreement itself, the Court might have decreed the execution of such a deed. Or if the agreement had been, that, in consideration of the Plaintiff assigning to them his patents, the Defendants should form themselves into a registered company, of which the Plaintiff should be a member,—it is not necessary now to determine the point—but it is possible that the Plaintiff would not have had great difficulty in obtaining specific performance. The Court might be inclined to decree specific performance, in order to give to a Plaintiff all the advantages which would accrue from the Company being so constituted as that he could sue it at law.

Judgment.

The agreement here is entire, and cannot be divided into an agreement to form a company, and a separate

(a) 1 Swanst. 509.

(b) 9 Ves. 357.

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agreement when the company is formed for the purchase by them of the Plaintiff's patents, and that he should give them the other benefits which are stipulated on his part. It is clear, that it is agreed that a company should be formed for the purpose of working the patents, and for the other benefits mentioned in paragraphs 10, 12, and 13.

[His Honour read them.]

The last provision in the 12th clause is open to the observation, that it may infringe the rule against restraint of trade, not being confined within any limits, either of time or place.

It is not specified that these stipulations shall be inserted in the partnership deed, but they are part of the contract on which the parties agree to form themselves into a company under the Joint Stock Companies Act, and agree to pay to the Plaintiff several sums of money, a certain sum immediately, and afterwards a royalty: 1000*l.* out of the first money to be raised by calls, and a further sum of 1000*l.* within a certain time after the incorporation of the company.

I will assume that the company was incorporated at the time of the agreement, and that the agreement was for sale to the company of the Plaintiff's patents, and that the Plaintiff should devote himself to the service of the company for two years. I think it is plain that this Court could not enforce such an agreement at the suit of the Plaintiff, because the company would certainly not have been able to enforce the Plaintiff's part of such an agreement against him. With respect to the observations that have been made upon the cases in which injunctions have been granted to restrain the breach of a negative term in an agreement, that this amounts in fact to specific performance of a part of those agreements, upon the Plaintiff in the cause agree-

ing to do all that is requisite on his part, as in *Dietrichsen v. Cabburn* (a), the distinction in those cases is, that where a person is ordered by injunction to perform a negative covenant of that kind, the whole benefit of the injunction is conditional upon the Plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved. But in this case, if I were to compel the Defendants to form themselves into a registered company, I could not afterwards undo that, whatever were to happen. They would have to pay the Plaintiff at once 1000*l.*; and when he was in possession of this money, and they were subject to all the liabilities which such a decree as is now asked for would impose upon them, what could the Court do if the Plaintiff were to refuse to perform his part of the contract.

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Lord *St. Leonards*, in *Gervais v. Edwards* (b), drew a distinction between the case of an agreement to execute a deed, which the Court would decree to be specifically performed, and an agreement to do acts beyond the power of the Court to enforce, to which he adhered in *Lumley v. Wagner*. In *Gervais v. Edwards* (b), the bill was for specific performance of a contract, of which one term was, that, if any damage should result to the lands of the Defendant above a mill-dam, which it was agreed should be erected, from such dam, the Plaintiff should give an equivalent in land as compensation for such damage, the damage and equivalent to be given to be ascertained and set out by arbitrators.

It was argued in that case, as it has been argued here, that the Court should direct a deed to be executed containing certain covenants. Lord *St. Leonards* said: "If the jurisdiction of this Court permitted it, I should willingly

(a) 2 Ph. 52.

(b) 2 Dr. & War. 80.

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grant a specific performance of this agreement, because the merits are altogether on the side of the Plaintiff; but I do not see how it is possible specifically to execute this contract. The Court acts only when it can perform the very thing in the terms specifically agreed upon; but when we come to the execution of a contract depending upon many particulars and upon uncertain events, the Court must see whether it can be specifically executed. Nothing can be left to depend upon chance, the Court must itself execute the whole contract. There are cases where some of the acts to be done consequent on the specific execution of the contract may be performed subsequently. Thus, a contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by instalments. It is a certain contract, and the manner of dealing with the thing sold by future cuttings is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution. This admits of no doubt." He added subsequently: "It is said, that this operates either in *præsenti* and has been executed by the award, or that the agreement in this respect might form a part of the deed. I am clearly of opinion, that this is not a matter to be presently ascertained, but is dependent upon the operation of works contracted to be erected, and can only be ascertained after the works have been in operation. The provision was to guard against the probable chance of future damage to the Defendant's land. No evidence has been read to show that it formed any part of the award, or that the arbitrators took it into their consideration; and the language of the award does not imply that they did. Well, then, it is a prospective measure, and what is the decree to be? It cannot be made the subject of covenant; that is not the agreement of the parties."

The Plaintiff in this case has not agreed to execute a deed containing covenants to do certain acts, but he has agreed to do certain things. He now seeks to compel the Defendants to form the company, and then they would be left to their remedy against him at law if he should fail in his part of the agreement. On these grounds alone I think that I could not decree specific performance as prayed by this bill. There is indeed a further difficulty, that the Defendants might refuse to act as directors if the company were formed; and also as there are only two members of the company who are desirous that the company should be formed, the others might assign all their shares to one of themselves, and then there would not be a sufficient number of members to satisfy the requirements of the Joint Stock Companies Act. But perhaps it might be answered to these objections, that it would not be competent to the parties to do any acts tending to annihilate the agreement they have entered into.

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However, it appears to me that this is one entire agreement, and I cannot decree specific performance of part of it, so as to give to the Plaintiff all the benefits for which he has stipulated, while the other terms of the agreement are of such a nature that the Court is unable to decree specific performance of them.

The demurrer must be allowed. The grounds of my decision do not leave any possibility of improving the case of the Plaintiff by amendment of the bill. The Plaintiff must pay the costs of the suit. I am not bound to assume that all the allegations in the bill are true, for the purpose of determining who is to pay the costs. Otherwise, in every case, Defendants might be driven to defend a cause up to the hearing instead of demurring, in order to save their costs.

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Feb. 18th,
& 27th.IN THE MATTER OF THE BRITISH SUGAR
REFINING COMPANY,

AND

IN THE MATTER OF THE JOINT STOCK
COMPANIES ACT, 1856.

*Joint Stock
Companies—
19 & 20
Vict. c. 47, s. 25.
—Motions—
Meetings—
Calls—Vali-
dity of.*

MOTION under the 25th section of the Joint Stock Companies Act, 1856 (a), on behalf of *Theophilus Faris*, the

The 25th section of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), enabling a shareholder whose name is without sufficient cause omitted to be entered in the company's register, to apply by motion for an order that the register may be rectified, was not meant to give to every shareholder *ex debito justitiæ* this summary remedy. The object of that section was, to enable the Court to avoid the inconvenience and injustice which occasionally arise from capricious or frivolous objections on the part of companies to complete the registration of their shareholders. It was not intended by the Act, that, in the event of there being a serious question to be tried, the matter should be disposed of summarily.

A resolution for a call may be good, though resolutions for calls for smaller sums had been previously negatived at the same meeting.

Whether, provided shareholders have had notice by means of circulars of a meeting for the purpose of making calls, a shareholder, who has attended such meeting, can object to calls made thereat, on the mere ground that the company omitted to advertise the meeting in any newspaper, as required by their deed of settlement—*Quære*.

But where a shareholder, having so attended at such meeting, had allowed others to pay their calls, and after lying by for six months assigned his shares:—*Held*, that his assignee could not, by motion under the 25th section of the Act, apply to have his name entered on the register, so long as the calls remained unpaid; and his motion was dismissed with costs.

(a) By the 25th section of this Act (19 & 20 Vict. c. 47), it is enacted, that, "If the name of any person is, without sufficient cause, entered or omitted to be entered in the register of shareholders of any company, such person, or any shareholder of the company, may, as respects companies registered in *England or Ireland*, by motion in any of Her Majesty's superior Courts of Law or Equity, and, as respects companies registered in *Scotland*, by summary petition to the Court of Session, apply to such Court for an order that the

register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained." The Act then contains certain other provisions, in case the company should make default in registering.

purchaser and assignee from *James Fraser*, of 500 shares in the British Sugar Refining Company, that the company might be ordered to rectify the register of their shareholders, by inserting therein the name, address, and quality of *Faris*, as the holder of the said shares; and also by inserting in the register the date at which *Fraser* ceased to be a shareholder of the company in respect of the said shares: *Faris* thereby offering to execute the company's deed of settlement.

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It appeared, that, in April, 1856, the capital of the company proving insufficient, a meeting of the shareholders was called for the 23rd of that month, with a view of considering the affairs of the company, and the steps to be taken with regard to the amount of capital.

The deed of the company provided that the directors should be authorised to make calls, with the concurrence of a general meeting; that in case of any meeting, original or adjourned, a circular notice should be sent to each of the shareholders; and that there should also be inserted in certain newspapers, three days before the meeting, a notice of such intended original or adjourned meeting.

It appeared that the meeting called for the 23rd of April was regularly held in conformity with the provisions of the deed, and was adjourned till the 9th of May. Circulars were sent to the several shareholders, giving notice of the adjourned meeting for the 9th of May; but no advertisement appeared to have been inserted in the newspapers, as provided by the deed. Several shareholders, however, attended the adjourned meeting; and, amongst them, *Fraser* was present. The first resolution was proposed and seconded by two of the directors of the company, that the directors should be empowered to make a call of 12s. 6d. per share, with a view to the efficient working of their refinery, and that the work-

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ing should be continued for a period of two clear months. That resolution was put and negatived. A second resolution was proposed and seconded, for a call of 10s. per share upon all the ordinary shares of the company, which was also negatived. It was then moved by *Fraser*, the owner of the shares in question, and seconded, that the directors should be desired to call two extraordinary general meetings of shareholders, in accordance with the requirements of the deed of settlement, for the purpose of winding up the affairs of the company. This resolution also was negatived. Then it was proposed and seconded, that a call of 15s. per share should be made for the general purposes of the company, of which 10s. per share should be due and payable on the 1st day of July then next; and that notice thereof should be sent to each of the shareholders, as directed by the deed of settlement. The last resolution was carried by a majority of twelve to four. Then a further resolution was proposed and seconded, that the directors should be authorised to accept at their discretion, and for the benefit of the company, the surrender of any shares, "patentee or ordinary," the holders of which might be unwilling to pay the call then voted, and that notice of this resolution should be sent to each of the shareholders.

Notices for the calls were directed to be given on the 1st of June, as provided by the company's deed, for the 1st of July then next. These notices were given, and a large proportion of the shareholders paid the calls. *Fraser*, however, did not pay; and in February, 1857, by a deed under the hands and seals of himself and *Faris*, he assigned to *Faris* the 500 shares in question.

In the meantime, in the preceding month, the directors having some misgivings as to the regularity of the call of the 9th of May, had advertised another meeting, for the purpose (if necessary) of ratifying that call.

Upon the motion being first made, an offer was made to *Faris* that he should be at liberty to attend this meeting ; but he declined. The motion was directed to stand over.

The meeting was held, in the absence of *Faris*, when the calls were ratified by a large majority.

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Mr. *Rolt*, Q. C., in support of the motion.

Argument.

The company have but one pretext for refusing to rectify the register as required by *Faris*, namely, that the calls alleged to have been made in respect of the shares assigned to him by *Fraser* have not been paid.

But those calls were invalid :—

First, by reason of the defect in the constitution of the meeting at which they were made, such meeting not having been advertised in any newspaper, as required by the company's deed.

Secondly, because, assuming the meeting to have been regularly constituted, the resolution for the call was irregular and invalid—first, because a call had been negatived by two previous votes of the meeting ; secondly, because this call was not carried until other business had been proceeded with ; and, lastly, because the call was conditional, and could be evaded by any shareholder who elected to surrender his shares, the effect of which would necessarily be to increase the liability of the continuing shareholders.

Mr. *Daniel*, Q. C., and Mr. *Hallett*, for the company, were directed by the VICE-CHANCELLOR, to confine their observations to the question of the alleged defect in the constitution of the meeting itself. In reference to which they

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cited the *Great North of England Railway Company v. Biddulph* (a), and the *London and Brighton Railway Company v. Fairclough* (b), to shew, that, there having been, by means of the special notices sent to the shareholders individually, a substantial compliance with the requisites of the provision requiring notices to be given previously to the holding of any meeting, literal compliance with the rest of that provision as to advertisements was dispensed with.

Besides, even if there were a doubt on the question as to the regularity of the meeting, and consequently as to the validity of the call, the Court had no jurisdiction under the Act to determine that question summarily, and upon a motion like the present—or, at any rate, it would refuse to exercise such jurisdiction (if any) in favour of a party who had purchased a disputed liability.

[They intimated that an action was about to be tried in respect of the disputed calls.]

Mr. Rolt, Q. C., in reply, contended, that the Court had jurisdiction under the Act to try the question, without directing or waiting for the trial of an action to determine the validity of the calls, and was bound to exercise that jurisdiction.

Judgment reserved.

Judgment.

The VICE-CHANCELLOR SIR W. PAGE WOOD, after stating the facts, proceeded as follows:—

The question I have to decide is, whether the company is

(a) 7 M. & W. 243.

(b) 2 M. & Gr. 674.

bound to register Mr. *Faris*, the company objecting to do so, on the ground that there remains an unpaid call made in respect of his shares; which objection would be valid if the call itself be valid.

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Now, the first ground upon which Mr. *Faris* disputes the validity of the call—independently of his objection as to the want of regularity in calling the meeting, to which I shall advert presently—was that the resolutions passed at the meeting were irregular, inasmuch as there had been, in the first place, two resolutions, which were negatived, with reference to a call; then another resolution with respect to winding up the affairs of the company; and after that a resolution, which was passed, for making the call which he disputes.

With regard to this first ground, it appears to me to be entirely frivolous, because it is quite clear that the meeting was assembled to determine what should be done in the difficult position in which the company was placed. One shareholder thought a call of 12s. 6d. would remedy it; another, a call of 10s.; another, nothing short of winding up the company. All these suggestions having been negatived, a fourth shareholder thinks a call of 15s. will be the proper remedy. It was perfectly competent to any shareholder to make that proposition, and for the meeting to entertain it and to carry it, if that meeting was regularly constituted.

Another ground of objection, assuming the legality of the meeting, was that a further resolution was carried, authorising the directors to accept surrenders of shares on the part of any person unwilling to pay calls. But I apprehend, that, whether that resolution were valid or invalid, it will not invalidate the prior resolution as to making the call itself. No subsequent irregular proceeding can in any

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way invalidate the resolution previously carried in favour of making this call.

It comes back, therefore, to the objection as to the want of regularity in calling the meeting,—whether or not there was a defect in the constitution of the meeting itself; and that question may be one of some nicety.

I confess, if I were under the necessity of deciding the point, I should entertain considerable doubt whether the objection could be sustained. In the first place, the circular notice is given and received; and certainly, if Mr. *Fraser* were the applicant on this motion, his application would be refused, for the reason I shall have presently to mention. But supposing an action to be brought against him in a Court of law, I confess it appears to me that it would be a very doubtful question, to say the least, whether, provided the shareholders have had notice in effect and substance of the calling of the meeting by the circular notices, the want of compliance with the provisions of the deed, as regards advertisement, would so invalidate the meeting as to make all the proceedings at the meeting irregular.

I do not find any authority in point arising precisely upon a case of this kind, but there are many cases upon Acts of Parliament containing directions of this description, quite as precise, if not more precise, where a notice has been considered as waived by the acts of the parties, provided there has been simple irregularity, and all the substantial requirements of the Act have been performed. I will refer to one case, the *Southampton Dock Company v. Richards* (a), where a great many objections were raised to a call, most of them turning upon the question of the regularity of the meeting at which the call was made,—whether certain

(a) 2 Railw. Cases, 215.

requisites in particular sections of the Act had been complied with: and most of the Judges held that there had been a substantial and sufficient compliance. Mr. Justice *Maule*, who was then a Judge of the Court of Common Pleas, says (a): "There may be some doubt, though I confess I entertain none, as to whether the requisites of sections 63 and 84 are sufficiently complied with as to the calls made. I apprehend, that, when a man is duly shewn to be a proprietor, he ought, at the same time, to pay up his calls. Calls *in fact* made, means, that, if made, and notice be given in the newspapers, a party shall not wait to take advantage of any irregularity at the trial. If he thinks, from any internal act of the directors, the calls will be revoked, he should endeavour to rectify the error, and procure such revocation; but if they are proved to have been advertised in the London and provincial newspapers, it is sufficient evidence of calls made; and I doubt whether, in itself, the entry in the book is not sufficient evidence of a call *in fact* made." The remarks in effect amount to this, that a party is not to take his chance of any irregularity till the last moment, even at law; but must take the proper step in proper time for the revocation of the call, if he thinks himself entitled so to do.

I ought to have noticed, that, in this case, in addition to the other facts I have stated, this resolution having been made on the 9th of May, and notices having been directed to be given for the calls, as provided by the deed, on the 1st of June for the 1st of July then next, such notices were in fact given, and a very large proportion of shareholders actually paid up on those calls. And it was not until January, that Mr. *Fraser*, finding the directors had some misgivings as to the regularity of their proceedings, and had advertised another meeting, bethought himself of assigning his shares to Mr. *Faris*, who makes this

(a) 2 Railw. Cases, p. 234.

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application, and in that manner raises the question in this Court as to the validity of the calls.

Now, Mr. *Fraser* having been present at the meeting on the 9th of May, having had due notice of that meeting beforehand, the circular having been sent which gave notice of that meeting, and there having been a substantial compliance with the deed requiring notice to be given, though not a full compliance with all the forms required by the deed,—I have great doubt, whether, at law, Mr. *Fraser* would be held entitled, at this distance of time, after having allowed the time to elapse during which the two calls became payable, and a large number of persons having paid, to raise a question as to the regularity of the meeting at which the calls were made.

But it is not necessary to say more, than that I entertain very great doubts upon the question, because, looking at the provisions of the Act, I have no doubt that it was not meant to give to every shareholder *ex debito justitiæ* this summary remedy. It is a power given to the Court to avoid the inconvenience and injustice which occasionally arise from capricious or frivolous objections on the part of companies to complete the registration of their shareholders. For the purpose of enabling a shareholder to vote, or for other purposes, with a view to which it might be of considerable importance to him to be placed in a right position, it might be very necessary to give this summary remedy. We all know that originally there was a circuitous mode of trying questions of this kind by writ of mandamus, by means of which the whole matter was put in due course of pleading: the return was made, and if there were a false return the whole matter would be brought before a jury, and the question regularly tried. But in this Act no such course is pointed out. I have no mode of trying the question except on affidavit, and I do not think it was intended by the Act

that, in the event of there being a serious question to be tried, the matter should be disposed of in this summary way.

As regards Mr. *Fraser*, there is no question, that, had he been the applicant, his application would have been refused with costs. It would have been enough to say to Mr. *Fraser* "You have come here after having accepted notice of the meeting; you have no pretence for saying you knew nothing of it; you were present; you raised no question as to the regularity of the meeting; you had your circular notice of the calls being made, and allowed the calls to be paid up by a number of other shareholders; and now you come, in January, to ask the Court summarily to relieve you by striking you off the register, and substituting another in your place." The answer in that case would be, "You, at all events, are not the person to have the benefit of this summary remedy, and the Court will refuse your motion with costs."

And as regards Mr. *Faris*, the person claiming to be put upon the register in respect of the assignment to him of *Fraser's* shares, he must be taken to have come here with full notice of what the question is between the parties. On his application to be put upon the register, the company's answer was, that there was an unpaid call due in respect of the shares assigned to him; he undertakes to fight that contest, and he stands precisely in Mr. *Fraser's* position. There is the less reason for granting him this summary remedy, because an action may be tried. The parties may or may not try it, but it is stated that an action is about to be tried in respect of these calls. If that action is decided against Mr. *Fraser*, on the ground of the original call being good, then *Faris* is in the wrong. If it is decided that something remained to be done to rectify the call, then, it strikes me

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SUGAR REFIN-
ING Co.

AND

In re
THE JOINT
STOCK COS.
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Judgment.

that *Faris* is in no way prejudiced, because, had he been upon the register the day he gave his notice of motion, he could not have prevented the acts ratifying the call, and making the subsequent call. He would have been in precisely the same position that *Fraser* would be in with regard to a subsequent call. He would have his rights against *Fraser*, or his duties towards *Fraser* on his contract, whatever his contract might be with *Fraser*. It is not before me, and therefore I do not know what it is. But he will be in the same position as he was before; and the meeting which was held when the motion was originally made, and which it was asked should stand over, will not prejudice him, because the offer was made to him of an opportunity of attending that meeting; and had he been a shareholder that very day, he would have been bound by the resolution of the shareholders, and would have had to pay the calls, so that he would be in the same position precisely *quâcunque* *viâ*.

Fraser is not in the same position. He is not the applicant before me. For very good reasons he is not so. I think he must see that the Court would not accede to a motion on his part; but, *Faris* having chosen to fight the battle for *Fraser*, for he can have no interest either way,—I think I ought to refuse his motion with costs.

1857.

IN THE MATTER OF THE TRUSTS OF THE WILL
OF MARY WRIGHT.

June 8th.

AND

IN THE MATTER OF THE TRUSTEE RELIEF
ACT.

MARY WRIGHT, by her will, dated in 1827, directed her executors to hold one-third part of her residuary personal estate upon trust for her daughter *Catherine* for life for her separate use, and after her death for her issue, and if she had no issue (which event happened) then to fall into the residue. And the testatrix gave an annuity of 300*l.*, free of legacy duty, upon trust for her son *William* for life; and an annuity of 500*l.*, free of legacy duty, upon trust for her daughter *Elizabeth* for life. And she gave all the residue of her personal estate to her daughter *Frances*, the wife of *Thomas Brown*, and appointed him her executor.

She died in 1831, and her executor proved her will.

He died in 1849, having appointed *Henry Brown* and *George Shaw* his executors, who proved his will, and thus became the representatives of *Mary Wright*.

Catherine Wright, *William Wright*, and *Elizabeth Wright* were all dead; and disputes having arisen with their representatives as to the arrears of their life interest and annuities respectively, they refused to give discharges to the trustees on receiving what the trustees considered to be due to them. *Henry Brown* and *George Shaw* paid into

several cestuis que trust disputes have arisen as to the amounts actually due to them respectively, are justified in paying into court, to the separate account of each cestui que trust, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds.

Payment into Court—Trustee Relief Act—Control over Fund—Costs.

Trustees who have paid a fund into court under the Trustee Relief Act, cannot prevent its being paid out to the cestui que trust absolutely entitled to it, on the ground that he is about to file a bill against them to take the accounts of the trust.

Trustees have a right to some sort of discharge from their cestuis que trust, not, perhaps, a release, unless the instrument creating the trust was under seal; and trustees, between whom and their se-

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 ———
In re
 WRIGHT'S
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 ———
Statement.

court, under the Trustee Relief Act, 143*l.* as the arrears of *Catherine Wright's* life interest, about 600*l.* as the arrears of the annuity of *William Wright*, and about 500*l.* as the arrears of *Elizabeth Wright's* annuity. These sums were paid to separate accounts in the matter of the above trust.

The petitioner was the legal personal representative of *Catherine*, *William*, and *Elizabeth Wright*; and he presented this petition, stating that he did not admit that the sums paid into court were the full amount of arrears due to him as such representative, but praying for payment to him of those sums.

Argument.
 ———

Mr. *Toller* for the petition.

Mr. *W. Forster* for the trustees:—

The petition shews that the accounts between the petitioner and the trustees are unsettled, therefore the Court will not part with the fund at present. Otherwise, the trustees may be harassed with litigation, and have no fund out of which to recover their costs. Suppose the fund were now in the hands of the trustees, the Court would not compel them to pay it over until the accounts were settled and the trustees completely indemnified. So if, in a suit against them, the trustees had admitted the possession of the fund, and they had been ordered to pay it into court, it would not be allowed to be paid out until the trustees' accounts were settled and they were indemnified. The trustees do not lose their control over the fund by paying it into court. They must be served with notice of any application concerning it. In *Chadwick v. Heatley* (a), the Court held, that a trustee under a will, on trans-

ferring stock to the cestui que trust, was entitled to a receipt in full of all demands, or else to a general administration, in order that he might be made secure against future demands.

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 —
Argument.

VICE-CHANCELLOR.—This statute is intended for the relief of trustees who may wish to exonerate themselves as to a particular trust fund by paying it into court; and, if they do pay in the fund, they cannot prevent the cestui que trust from having it paid out to him. The trustees might have had a right to keep the fund in hand; but, having paid it into court, it is out of their hands, and it is too late then for them to seek to retain a hold upon the fund, on the ground that the cestui que trust intends to file a bill against them for an account. They should have thought of that before they paid the fund into court.

Mr. *Toller* then argued that the trustees ought not to have their costs, because they had paid part of the fund into court while more was claimed to be due; and unnecessary expense might be occasioned by paying in a fund piecemeal in this manner. He referred to *Re Woodburn's Trust*, not yet reported, in which the Lord Chancellor decided that the Court had jurisdiction under the Act to make trustees pay costs.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

I think that the trustees were entitled to pay this money into court, as they have done. There seems to have been some dispute as to each of the three sums paid in. The trustees had a right to refuse to pay the funds over to the party entitled to them, unless a full discharge was given to them. Every trustee has a right to have some sort of dis-

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charge, perhaps not a release under seal, unless the trust was created by an instrument under seal.

The trustee may refuse to pay over the fund until the accounts are settled; or, since the passing of this Act, he may say, I admit that there is so much due, and may pay that into court. He cannot be compelled to administer the trust piecemeal. If the cestui que trust refuses to admit that the account is correct and to give a discharge, the trustee would be justified in filing a bill to have the accounts taken, though that course of proceeding is not to be encouraged as beneficial to cestuis que trust in general. The trustee, however, is justified in paying into court under this Act the amount which he believes to be due, and leaving the cestui que trust to file a bill against him to claim more if he chooses. It was argued, that a trustee ought to pay in at once all that is really due, and not to pay in the fund piecemeal; but since the recent decision, any vexatious proceeding, such as paying in small sums at several times, may be punished by making the trustee who does so pay the costs thereby occasioned.

I think that the trustees were justified in paying these sums to separate accounts. They had a right to have a discharge on each account, and it was not an unreasonable course to take; and, therefore, I cannot refuse them their costs.

1857.

THE COLLINS COMPANY v. BROWN.

June 10th.

THE *Collins* Company of *Collinsville*, in the county of *Hartford*, in the state of *Connecticut*, in the United States of *North America*, edge tool manufacturers, filed the bill in this suit against *Charles Brown*, stating that the Plaintiffs were an incorporated company, whose principal business was the manufacture of all kinds of edge tools, which were of a very superior description and quality, and had acquired a high reputation in various parts of the world, and especially in the markets of *America*, *Cuba*, and *Australia*; that, for the purpose of distinguishing their manufactures, the company had been in the habit of causing to be stamped or engraved on the goods manufactured by them the words "*Collins & Co., Hartford Cast Steel, Warranted;*" and had also been in the habit of causing to be pasted or fixed on the articles manufactured by them, printed labels containing the words "Look for the stamp *Hartford*, if you want the genuine *Collins & Co., Sam. W. Collins;*" and upon axes manufactured by them, printed labels containing the words, "Look for the stamp *Hartford*, on each axe, if you want the genuine *Collins & Co., Sam. W. Collins;*" the latter of such labels being chiefly used for axes. All such labels were in the same form, with white letters printed on a black ground, the words "*Sam. W. Collins*" being in written characters, and forming a fac-simile of the signature of *Samuel Watkinson Collins*, the manager of the company, and all the other words were in roman capital letters. That the company had, under the circumstances aforesaid, acquired the exclusive right to the said mark and to the said labels; that during the last year the company had received, for the first time, intimation that a great va-

*Trade-mark—
Foreigner—
Fraud—In-
junction.*

There is no property in a trade mark; but a person, who has been in the habit of using a particular mark, may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury.

A foreign manufacturer has a remedy by suit in this country for an injunction and account of profits, against a manufacturer here, who has committed a fraud upon him by using his trade mark, for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner.

This relief is founded upon the personal injury caused to the Plaintiff by the Defendant's fraud, and exists, although the Plaintiff resides and carries on his business in another country, and has no establishment here, and does not even sell his goods in this country.

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riety of tools of similar manufacture, but of inferior price and quality, had been imported from *England* into *America, Cuba, Australia*, and other places, with marks and labels thereon similar to those stamped and affixed as aforesaid upon the tools of the company; but that the company were unable to ascertain who were the parties who had imported the same. However, a few days since, the company had, for the first time, ascertained that the Defendant, who had for some time past been carrying on the business of saw and steel manufacturer in *Sheffield*, had been long fraudulently using and imitating the said trade mark and labels of the company; and that, acting both on his own account, and in collusion with and as the agent of certain other persons, the Defendant had obtained possession of, or procured to be prepared, stamps having the words, "*Collins & Co., Hartford Cast Steel, Warranted,*" or some other words or marks only colourably differing from the marks used by the said company; and had also, from certain blocks or plates which had come into his possession or which he had procured to be made for the purpose, caused to be printed large quantities of labels, which were fac-similes of, or which only colourably differed from, the labels so used by the said company; and had for some years past been manufacturing axes, picks, matchets, and other tools, in form and appearance closely resembling the tools of the said company, but of inferior quality and price, and had been in the habit of stamping or branding such tools of his own manufacture with the said stamps or marks, and of affixing thereto the said labels, and had sold such articles in large quantities to various persons in *England* and elsewhere, and both for the home market and for exportation, and had made large profits by such sale.

The Plaintiffs charged that such tools had been so manufactured by the Defendant, and had been and were about to be sold, with the view and for the purpose of passing off the same in the markets where the tools of the said

company were best known, as being the tools of the said company.

The Plaintiffs further charged, that, in consequence of the inferior quality of the goods so manufactured and sold by the Defendant as aforesaid, the character and reputation of the company's goods had suffered, and the company had sustained a considerable loss; and that such loss would be greatly increased if the Defendant should be permitted to continue to use the said marks and labels which had been hitherto used by him.

The bill prayed for an account and payment of gains and profits made by the manufacture or sale, by the Defendant, of tools having the aforesaid marks or labels colourably differing from the said trade marks and labels of the company, and for delivery up of all tools, &c., in his possession or power, having such marks or labels, in order that such marks and labels might be effaced, and also of all stamps, plates, blocks, and labels, for the like purpose; and for an injunction to restrain the Defendant from putting marks or labels upon his tools similar to or only colourably differing from those of the company, or any marks or labels so contrived as to induce the belief that his tools were manufactured by the company, and from selling, exporting, or otherwise disposing of tools so marked.

The Defendant demurred.

Mr. *Martindale*, for the demurrer :—

The Plaintiffs in this suit are an *American* Company. They have no establishment in this country. It is not alleged that they ever manufactured or sold goods here. They have no right to any trade mark in this country, and therefore cannot be defrauded or wronged by another per-

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son here using their marks. They may sue in their own country any person there who sells goods so as to interfere with their trade. In case of foreign copyright, that gives the author no similar rights in this country. So a patent in *America* may be infringed in this country without redress; and the same rule must extend to using trade marks, or tradespeople in this country would never be safe against suits by persons in other countries, complaining of violations of rights, of which perhaps they were utterly ignorant. He cited *Pisani v. Lawson* (a).

The VICE-CHANCELLOR referred to *Sykes v. Sykes* (b).

Mr. *Rolt*, Q. C., and Mr. *Eddis*, for the Plaintiffs, were not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The point raised by this demurrer depends upon the question whether this is a personal right or not. If it be personal, the injured party may obtain a remedy against the Defendant in the country where he resides, wherever the injury may have been done. The complaint is, that a fraud has been committed by the Defendant by using the trade mark of the Plaintiff, and thus representing that the goods manufactured by himself were manufactured by the Plaintiff.

It is now settled law, that there is no property whatever in a trade mark, but that a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no

(a) 6 Bing. N. C. 90.

(b) 3 B. & C. 541.

one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. That would be a fraud upon the person who first used the mark in the market where his goods are sold. The simplest case is, where a man puts his name and address on the goods which he manufactures; it would be unlawful for another manufacturer to put that name and address on his goods, because to do so would be to give to all the world the impression that they were manufactured by the person whose name and address they bore.

The simple question in these cases is, has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him; and if so and if no one else has been in the habit of using that mark, another man has not the right to use that mark, so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to have been in the habit of using it.

As long ago as in the time of Lord *Hardwicke*, in the case of *Blanchard v. Hill* (a), where that learned Judge refused an injunction to prevent the Defendant from making use of the Great Mogul as a stamp upon his cards, to the prejudice of the Plaintiff, upon a suggestion that the Plaintiff had appropriated it to himself, conformable to the charter granted to the *Card Makers Company* by *King Charles the First*, Lord *Hardwicke*, in giving judgment, said: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it. Mr. *Attorney-General* has mentioned a case where an action at

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(a) 2 Atk. 484.

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law was brought by a clothworker against another of the same trade, for using the same mark, and a judgment was given that the action would lie: (Poph. 151). But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design to put off bad cloths by this means, or to draw away customers from the other clothier."

That is the true foundation of the jurisdiction in these cases. If a man has been in the habit of using a particular mark for his goods for a long time, during which no one else has used a similar mark, and then another person begins to use the same mark, that can only be with a fraudulent intent; and any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded.



1857.
 June 11th.
 See last pre-
 ceding case.

THE COLLINS COMPANY v. COWEN.

THE bill in this case was in substance the same as that in the last preceding case.

The Defendants demurred.



Argument.

Mr. *Swanston*, jun., in the absence of Mr. *Cairns*, Q. C., for the Defendants, relied upon the circumstance, that the Plaintiffs were a foreign company, having their remedy, if any, abroad, although the bill did not aver that they had any remedy even there; and the Defendants had obtained by user the right to this trade-mark in *England*.

He insisted upon the analogy of cases upon copyright, citing *Chappell v. Purday* (a), and of those upon patents, to which, although depending to a certain extent on special Acts of Parliament, the argument derived from the alleged dishonesty of the transaction was equally applicable.

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But who were defrauded? The public. But not the *British* public, only a cosmopolitan public. And, if foreign Courts did not protect their own subjects, it was not for any Court in this country to interfere.

The Plaintiffs' right was foreign. The infringement was foreign. Selling in this country was not averred; and selling under false pretences—misleading the public—lies at the root of all cases of this description: *Edelsten v. Vick* (b).

He cited also *Farina v. Silverlock* (c), *Motley v. Downman* (d), and *Pisani v. Lawson* (e).

Mr. Rolt, Q. C., and Mr. Eddis for the Plaintiffs were not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I cannot entertain any doubt at all upon this case. It is exactly similar to that of the *Collins Company v. Brown* (suprà, p. 423), which came before me yesterday. The right is as I then stated it. The principle on which it proceeds is well established, and was settled, I believe, in the case before Lord Hardwicke, of *Blanchard v. Hill* (f). I may now state it in Lord Langdale's words in *Perry v. Truefitt* (g). He says: "I think that the principle upon which

Judgment.

(a) 4 Y. & C. 485.

(b) 11 Hare, 78.

(c) 6 D. M. G. 214.

(d) 3 My. & Cr. 14.

(e) 6 Bing. N. C. 90.

(f) 2 Atk. 484.

(g) 6 Beav. 73.

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both the Courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man. He cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark ; but, whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

It was argued that there is nothing to shew that the law of *America* does not allow persons to cheat others by putting on their own goods the name of some other person who has acquired a celebrity in the manufacture, and passing off their own goods as being the goods of some one else; and reliance was placed upon the analogy of cases of copyright. The question has nothing to do with the question of copyright. It is not a question whether a person is injured in his property in respect of particular rights, but whether a direct fraud has been perpetrated on another by your placing on articles which you manufacture that which is to lead everybody else to believe them to be articles manufactured by the other. I apprehend that every subject of every country, not being an alien enemy—and even to an alien enemy the Court has extended relief in cases of fraud—has a right to apply to this Court to have a fraudulent injury to his property arrested. And here the Plaintiffs have the right

—a right recognised, I imagine, everywhere in the world, or at least in every civilised community—of saying, “We, being the manufacturers of certain goods, claim that another man shall not manufacture goods, and put upon them our trade mark, and then pass them off as manufactured by us.”

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It was argued that these Defendants have acquired the trade mark. But the acquiring a trade mark is not the question. No person can acquire property in a trade mark. The question is, whether these Defendants have acquired a right to do that which the bill charges they are doing—a right to put the names and address of the Plaintiffs, and the trade mark of the Plaintiffs on their goods, for the purpose of selling them as being the work and manufacture of the Plaintiffs. That is the fraud which has been perpetrated; and it is a fraud which, I apprehend, every civilised community will arrest at the fountain head, wherever it finds it commenced and about to be perpetrated.

The case of *Sykes v. Sykes*(a) shews that this equity does not depend upon the circumstance of the sale being made with a view to persuade the immediate purchaser that the goods are the manufacture of another. In *Sykes v. Sykes*, the immediate purchaser was well aware that he was purchasing what was the vendor's own manufacture; but he bought it for the purpose of palming it off on others as the manufacture of another. The fraud, therefore, was complete. And so, I apprehend, the fraud, in this case, is complete, assuming, as the demurrer must assume, the averments in the bill to be correct. It would be most grievous if any Court should hold that there was an incapacity of affording relief in a case where a fraud has been committed upon a subject of any country. I speak, of course, of a fraud so far connected with property as to be, not a shadowy, but a substantial injury. For, as

(a) 3 B. & Cr. 541.

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in the case of Sir *James Clarke*, whatever proceedings a Plaintiff may have a right to take by way of action for libel, he cannot take proceedings in this Court for the mere circumstance of his name being used in a manner which, if the public were so absurd as to believe it (which they hardly could in that case), would expose him to contempt. If you use the name of another for the purpose of securing to yourself, in the disposition of property, advantages which belong to him, the fraud is complete, and the remedy ought to be complete, as in the case of a libel, where the action is allowed to a foreigner.

I cannot, in my own mind, entertain the slightest misgiving in this case, whether it be new or not.

The law, as stated in the case of *Farina v. Silverlock* (a), does not in the least differ from that laid down by Lord *Langdale*. There the Lord Chancellor says (b): "The Plaintiff's equity is founded on the jurisdiction of this Court to give relief in the shape of preventive justice in order to make more effectual a legal right, the legal right here being a right to have a particular trade mark to designate a commodity." Then he adds: "This right cannot be properly described as a copyright. It is, in fact, a right which can be said to exist only, and can be tested only, by its violation. It is the right which any person designating his wares or commodities by a particular trade mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade mark in order to mislead the public, and so, incidentally, to injure the person who is owner of the trade mark." That exactly agrees with the view taken by Lord *Langdale*. The first words by themselves might have misled.

There must be the usual order overruling the demurrer.

(a) 6 D. M. G. 214.

(b) Id. 217.

Mr. *Martindale* appeared on behalf of the Defendant in the cause of the *Collins Company v. Brown*, for the purpose of making, on his behalf, a public apology for having manufactured another man's goods, stating that he was wholly ignorant that he was so doing.

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THE VICE-CHANCELLOR.—It is very much to your client's credit that he should make that apology. I cannot conceive of anything, short of indictable offences, more discreditable than this course of proceeding.

THE BRITISH EMPIRE SHIPPING COMPANY
(LIMITED)

June 2nd.

v.
SOMES.

THE bill averred that in January, 1857, the Plaintiffs commenced an action against the Defendants, who were shipwrights, to recover back so much as was excessive of a sum of 8,816*l.* 15*s.* 2*d.*, paid under protest by the Plaintiffs to the Defendants, in respect of repairs done by the latter to the Plaintiffs' ship: which action was still pending. That in February following the Defendants obtained an order, under the Common Law Procedure Act, 1854, for a compulsory reference of the cause to arbitration. That the Plaintiffs intended to proceed with the action and arbitration; but, in order to ascertain the propriety of the items of sums charged in the Defendants' accounts for the repairs and materials therein alleged to have been done and supplied to the Plaintiffs' ship, it was

Jurisdiction—
Discovery—
Arbitration—
17 & 18 Vict.
c. 125, ss. 3, 7.

Courts of
Equity have
jurisdiction
to entertain
a Bill for dis-
covery merely,
in aid of a
compulsory
reference to
arbitration,
ordered
under the
3rd section
of the Com-
mon Law Pro-
cedure Act,
1854, (17 & 18
Vict. c. 125.)
And this juris-
diction is not
discovery inde-

affected by the powers given by the 7th section of the Act, of compelling pendency of the assistance of Courts of Equity.

To such an arbitration, Lord *Eldon's* dictum, in *Street v. Rigby* (6 Ves. 821), as to the reluctance of Courts of Equity to be auxiliary to domestic forums, has no application.

Demurrer to a Bill of this description overruled with costs.

1857.
 THE BRITISH
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absolutely necessary to make a careful examination of the details thereof, and such examination could not be made without the production and inspection of the various documents in the Defendants' possession thereafter referred to, comprising, inter alia, the returns made to the shipwrights by their workmen, who were employed by piece work, of the quantity and nature of the work done by them; upon which returns their pay was based. The bill averred that the Plaintiffs could not safely proceed with the action and arbitration until the Defendants should have given the discovery sought of them in the suit, nor unless or until the aforesaid returns, documents, and writings in the Defendants' possession should have been produced and inspected; but the Plaintiffs were unable to obtain such discovery, production, and inspection from the Defendants in the action or without the assistance of this Court. The bill, therefore, prayed that the Defendants might make a full discovery of the matters aforesaid.

The Defendants demurred.

Argument.

Mr. Rolt, Q. C., and Mr. Shapter, in support of the demurrer:—

In a case like the present, a bill for discovery merely will not lie.

The action has been turned into an arbitration; and this Court will not be auxiliary to grant discovery in aid of an arbitration. Parties shall not obtain discovery here and relief before the arbitrator: *Street v. Rigby (a)*.

Besides, the arbitrator has full power to grant the discovery for which the Plaintiffs have come to this Court. Such

(a) 6 Ves. 821.

a power is inherent in the arbitrator in all cases of arbitration, and in this particular species of arbitration it is expressly given by the legislature: compare the 7th section of the Common Law Procedure Act, 1854, with the 40th section of the Law Amendment Act, 3 & 4 Will. 4, c. 42, which shews that the Court or the Judge at common law can command the attendance and examination of any person to be named, or the production of any documents to be mentioned, in the rule or order; and where a Court of ordinary jurisdiction can itself compel the discovery required, a Court of equity will not interfere: *Mitford Pl.* 221, 222.

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Argument.

We rely on the broad rule that the Defendants are not to be doubly vexed, both at law and in equity.

They cited *Phelps v. Prothero* (a) and *Farebrother v. Welchman* (b).

Mr. *Druce* was not heard in support of the bill.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It is clear that the Common Law Procedure Act, 1854, has not made any difference in the course which this Court will adopt as regards entertaining bills for discovery in aid of an action, in a case of compulsory arbitration under the Act.

Judgment.

The Act does not bring such a case within the dictum cited from *Street v. Rigby* (c). What Lord *Eldon* there says is this:—"I recollect passages in which Courts of justice, however full of eulogia upon these domestic forums, have recollected their own dignity sufficiently to say they

(a) 16 C. B. 370. (b) 24 Law J., N. S., Ch., 410. (c) 6 Ves. 821.

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 —
Judgment.

would not be auxiliary to those forums; that the parties should not be permitted to take their relief from them, coming here for discovery." If that is the foundation of the objection to this Court giving discovery—and it is the only one mentioned by Lord *Eldon*—it is clear that it cannot be in any way applicable to a case like the present,—a case of compulsory arbitration before a public forum which the legislature has provided for the determination of questions like the present; not a voluntary arbitration before private friends, but before the tribunal which the legislature has thought fit to employ. It is clear that after such a compulsory order of reference to arbitration, the cause is as much before the High Court of Judicature as it was before.

The only possible ground upon which the demurrer could be argued was, that the arbitrator has already, under the Act, the power to compel discovery; and that where such a power exists, as in case of the *Ecclesiastical Courts* (a), equity will not interfere. The section of the Act which was relied upon to shew that the arbitrator has this power was the 7th, which enacts that the proceedings upon any compulsory arbitration shall, except otherwise directed by the Act or by the submission or document authorising the reference, be conducted in like manner and subject to the same rules and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, and so forth, as upon a reference made by consent under a rule of court or judge's order. Then, referring to the 40th section of the *Law Amendment Act*, 3 & 4 Will. 4, c. 42, I find it enacted, that when any reference shall have been made by any such rule or order as there mentioned, or by any submission containing such agreement as there mentioned, it shall be lawful for the Court by which such rule or order shall be

(a) *Dunn v. Coates*, 1 Atk. 288.

made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order. But, in reference to this argument, it should be observed that the common law courts have now the power in all cases, and not merely in cases of arbitration, of calling for the production of books and papers. And yet this Court has held that such power does not prevent a Court of equity from ordering such production, either because Courts of equity have concurrent jurisdiction with the common law Courts, or because the relief granted in this respect by the common law Courts is not commensurate with that which this Court would extend. That this is the case is obvious, amongst other considerations, from the circumstance that, in order to obtain production of a document at common law, it is necessary for the party to describe what the document is, which it is often impossible for him to do with sufficient certainty.

I think it, therefore, clear that the power given by the Act, in the case of an arbitration like the present, does not deprive this Court of its jurisdiction to entertain a bill for discovery.

The demurrer must be overruled; and, as usual in the case of an experiment which has failed, it must be overruled with costs.

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 EMPIRE
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 Judgment.

June 5th, 8th,
& 10th.

WEBB v. HEWITT.

*Principal and
Surety—Dis-
charge in
Equity—Re-
servation of
Right.*

A creditor upon giving time to his principal debtor may reserve his rights against the surety, and this without communicating the arrangement to the surety.

But when the creditor gives a release to the debtor he cannot reserve any right against the surety, because the debt is gone at law.

An agreement between a bond debtor and his creditor, that the latter shall take all the debtor's property, and shall pay his other creditors five shillings in the pound, though not a discharge of the bond at law by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; and it is not possible in equity, upon such a transaction as that, to reserve any rights against the surety; and any attempt to do so would be void as being inconsistent with the agreement.

THE Plaintiff gave a bond to the Defendant, dated the 25th of March, 1841, in the sum of 1000*l.*, subject to a condition whereby, after reciting that by an indenture bearing even date with, but executed before, the execution of the bond, and made between the Defendant of the one part and *Charles Field* of the other part, the Defendant had demised to *Charles Field* a certain dwelling house, and brewery, and premises, from the 25th day of March, 1841, for the term of fifty years, if *Field* should so long live. And that *Field*, for the purpose of securing payment to the Defendant of such principal and interest moneys as were afterwards in the condition mentioned, had given to the Defendant a certain other bond, bearing even date with the said indenture of lease and with this bond. And that it had been agreed that due payment to the Defendant of the said principal and interest moneys should be further secured by the bonds of three sureties, each in the sum of 1000*l.*; and that the Plaintiff, as one of such sureties, had accordingly agreed to execute to the Defendant this bond with the condition thereunder written. The condition of the bond was declared to be such, that, if the said *Charles Field*, his heirs, executors, or administrators, did and should, at the end, expiration, or other sooner determination of the said indenture of lease, well and truly pay or cause to be paid to the Defendant, his executors, administrators, or assigns, the sum of 6275*l.*, and also such further sum or sums of money (if any), as the Defendant might advance and lend to the said *Charles Field* within one year from the day of the date of the bond (not exceeding, with the said sum of 6275*l.*, the sum of 10,000*l.* in the

whole), and should in the meantime, and until the end, expiration, or other sooner determination of the said indenture of lease, pay to the Defendant, his executors, administrators, or assigns, in respect of the principal money for the time being remaining upon security of the said recited bond of the said *Charles Field*, interest at the rate of 5l. per cent. per annum, half yearly, the bond should be void. Provided that it should not be lawful for the Defendant, his executors, administrators, or assigns, before the expiration or other sooner determination of the said indenture of lease, to recover or sue for the principal money intended to be secured by the said bond of the said *Charles Field*, or by this bond or any part thereof, unless and until the half yearly interest payable as aforesaid, or some part thereof, should be in arrear for the space of four calendar months, anything in the bond of the Plaintiff or in the bond of the said *Charles Field* contained to the contrary notwithstanding. Provided also, that it should be lawful for the said *Charles Field*, his heirs, executors, or administrators (if and as often as he or they should think fit), to pay to the Defendant, his executors, administrators, or assigns, on any of the said half yearly days of payment of interest, all or any part of the said principal money so secured as aforesaid, in instalments or sums of not less than 300l. nor greater than 600l. each, he, the said *Charles Field*, his heirs, executors, or administrators, giving to the Defendant, his executors, administrators, or assigns, not less than three calendar months notice in writing of the intention of him the said *Charles Field*, his heirs, executors, or administrators, so to do, anything in the bond of the Plaintiff, or in the bond of the said *Charles Field*, contained to the contrary thereof in anywise notwithstanding.

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 Statement.

The Defendant, after the date of the bond, advanced to *Field* divers sums of money, amounting in the whole, to-

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 ———
 Statement.

gether with the said sum of 6275*l.*, as the Defendant alleged, to the sum of 9000*l.*

A memorandum of agreement was made on the 22nd of August, 1845, between *Field* of the one part, and *Hewitt* of the other part, and thereby, in consideration of the debt due by *Field* to *Hewitt*, and of *Hewitt* having at the request of *Field* paid certain of his debts in full, and paid, or agreed to pay, a composition of not less than five shillings in the pound upon the rest of the debts of *Field*, particularised in certain accounts therein mentioned, and of a general release to be given by *Hewitt* to *Field*, *Field* undertook, at the request, costs, and charges of *Hewitt*, to surrender to *Hewitt* the lease of the said brewery and other premises therewith held by him, and to assign and deliver to *Hewitt* the plant, utensils, casks, carts, drays and horses, and stock in trade, at or belonging thereto, and also all his household furniture, plate, linen, china, and effects of every kind, and to assign over to *Hewitt* or his nominee all book and other debts due and owing to him *Field*, individually or jointly with any other person or persons or otherwise howsoever, and all securities for the same, and with full powers to receive, recover, and give discharges for the same. And *Field* thereby agreed to convey, assign, and assure to *Hewitt* all his freehold, leasehold, and real and personal estate of every kind, and for the purposes aforesaid to make, do, and execute all such acts, deeds, and assurances as *Hewitt* or his counsel should devise or require. And *Field* thereby authorised *Hewitt* or his agents forthwith to enter upon and receive and keep possession of all the estate, property, debts, chattels, and effects, comprised in the agreement, notwithstanding that the same had only been partially performed by him.

Conveyances were afterwards executed pursuant to such agreement. *Field* had since died.

On the 25th of August, 1856, the Defendant, without having made any previous demand upon the Plaintiff, put the bond in suit against him. The Plaintiff filed this bill to restrain the action, and to have the bond delivered up to be cancelled.

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Statement.

Evidence was given on the part of the Defendant to prove that there should have been inserted in the agreement a reservation of right against the surety.

Mr. Rolt, Q. C., and Mr. Bevir for the Plaintiff cited *Owen v. Homan* (a), *Boulton v. Stubbs* (b), and *Lewis v. Jones* (c).

Argument.

Mr. Cairns, Q. C., and Mr. Pryor, for the Defendant, cited *Wyke v. Rogers* (d).

The VICE-CHANCELLOR reserved judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this cause was, whether the Plaintiff who gave a bond for 1000*l.* as surety for moneys advanced to another person, named *Charles Field*, is entitled to be liberated from the suretyship, in consequence of the transaction which afterwards took place between the creditor and the principal debtor. Many questions have been raised upon the effect of the recent decisions at law, which have not a very material bearing on this case. However, I have thought it right to look into the authorities on the subject; and I think that they have brought to a clear result almost all the points which have been argued before me. The

June 10.
Judgment.

(a) 4 H. L. Ca. 997.
(c) 4 B. & Cr. 506.

(b) 18 Ves. 20.
(d) 1 De G. M. & G. 408.

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question principally argued was, how far a creditor has a right when discharging his principal debtor, either by giving time or by release, to reserve his remedies against the surety. Here a further question arises, how far under this agreement the creditor would be entitled to the benefit of the reservation supposing he could have made it.

As to giving time, the authorities, which are almost innumerable, have settled that upon any giving of time to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged; for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial.

A release, however, stands upon an entirely different footing. The case of *Nicholson v. Revill* (a), which is recognised in *Kearsley v. Cole* (b), has decided that, when an actual release is given, no right can be reserved, for the debt is gone at law. In *Nicholson v. Revill*, the Court commented on the observations of Lord Eldon in *Ex parte Giffard* (c), saying that, if those observations were meant to extend to this, that the principal debtor could be entirely released, so that the debt should be extinguished, and yet the right reserved against the surety, they thought the dicta went too far. In *Kearsley v. Cole*, Mr. Baron Parke says, he does not conceive Lord Eldon's observations were meant to have any such effect as that, which he says would be inconsistent with the previously decided cases; but that what he meant to say was, that there might be a giving of time, not a release, but a covenant not to sue, so that the debt still re-

(a) 4 Ad. & Ellis, 675. (b) 16 M. & W. 128. (c) 6 Ves. 805.

mained, that would not operate as a discharge to the surety if the right were reserved; but that, if the debt was gone, then there was nothing that could be reserved against the surety.

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 HEWITT.
 Judgment.

Another nice point arose in *Kearsley v. Cole* (a), where a great deal of the learning on this subject is collected in a short compass; namely, what was the position of a principal debtor with reference to his surety who had acquiesced in the arrangement with the creditor, whether the surety, by joining in the agreement, had not in effect sanctioned it for all purposes, and agreed to stand only in the place of the creditor against the principal debtor, so that if the creditor had agreed to take from the debtor five shillings in the pound, and the surety had acquiesced in the right retained against himself, the creditor might come against the surety for the whole debt, but yet the surety, because he had agreed that he would only stand against the principal debtor in the place of the creditor, might be entitled as against the principal debtor to the five shillings in the pound only. That was the point argued in *Kearsley v. Cole*, and it was decided that the surety retained his full rights against the debtor, although he was cognisant of, and concurred in the arrangement.

In the case before me, there is clearly no discharge at law, by accord and satisfaction, because the instrument by which the accord and satisfaction is alleged to have been made is not under seal. That point is determined in *Rogers v. Payne*, of which there is a short note in 2nd *Wilson*, 276, and a full account in Mr. *Selwyn's* book, under the head of "Covenant" (b). An agreement being there pleaded by which certain arrangements were to be made which were to be taken in full satisfaction of the debt, it was held, that, the agreement not being under seal, it could not be pleaded in accord and satisfaction of the debt which had been created by an instrument under seal. In this

(a) 16 M. & W. 128.

(b) *Nisi Prius*, 6th ed. p. 524.

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—
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case, therefore, the agreement being simply in writing, would not amount to a discharge at law, and the only question is, what is its effect in equity? There can be no doubt that the agreement was an equitable discharge, which would of course release the surety.

[His Honour stated the effect of it.]

It struck me, since the discussion on the argument, that the question raised here is hardly capable of being suggested on the part of the Defendant, for this reason. There is neither a giving of time, nor the mere circumstance of release, but an actual sale. The debt is satisfied and gone. No part of the agreement is disputed. *Field* agrees to assign to *Hewitt* all his property; and on the face of this agreement (and there is no evidence to the contrary in this suit), there was no valuation made. It might or might not be, that Mr. *Hewitt* would then get full satisfaction: it was not an assignment upon trust to pay *Hewitt* and the rest of the creditors five shillings in the pound. Probably it was estimated that the effects would pay five shillings only in the pound to *Hewitt* and the other creditors; but upon the face of the agreement *Hewitt* may be taken to have contemplated not only that his debt would be satisfied by having this property, but more than satisfied, for he agreed on taking it to pay five shillings in the pound to the other creditors. It was in either view a complete sale. The debt is gone in equity, and it is impossible to reserve a right against the surety in such a transaction as that. I do not know what inquiry the surety could make. It seems to me that he is not in a condition to ask for any inquiry. A debtor has agreed with his creditor in consideration of the creditor making over all his property, not only to give him a release, but to pay his other creditors five shillings in the pound. That being the case, it seems to me to be of very little avail to consider the evidence with regard to the supposed arrangement; but

when I come to sift that evidence, it would not entitle the Defendant to insist upon having added to the agreement a reservation of rights against the surety, because upon the authorities I have cited a release could not be made with that reservation of right; and, therefore, if I were to alter it at all, I must modify the agreement so as to make it an agreement not to sue the principal debtor, with a proviso that it is not to have any effect in liberating the surety.

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[His Honour then examined the evidence, and continued:]

It is not alleged in that evidence, that the agreement was defective in any particular, except that there should be added a clause by which the rights and remedies against the sureties should be reserved. It appears to me that such a clause would be entirely inconsistent with the whole frame of the agreement, which is, that the creditor was to have the debtor's whole property in satisfaction of his debt, and was to give a release. He is under no obligation to account to anybody. How can he say against the sureties, I have taken full consideration for my debt and yet there is a debt existing? That seems to me to be the whole case. There is no suggestion that *Hewitt* ever meant to make himself accountable in respect of any of his property.

[His Honour then considered another point which was raised on the evidence, and concluded:—]

But what I rest my judgment on principally is, the result of this transaction upon the face of it. There is nothing in evidence that shakes any portion of the agreement. The utmost that the evidence amounts to is, that there was an intention with this agreement, such as it is, to assert a reservation of right against the surety. I hold, that if such a reservation of right had been put in it would have been a nullity. If a man, in consideration of the

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debt due from his principal debtor, agrees to buy the whole of the debtor's property, he has been paid; and if he has been paid, he cannot reserve his rights. That is the simple point to which the case is reduced.

Therefore, the Plaintiff is entitled to have his injunction made perpetual; and to have a declaration that the Defendant has released the Plaintiff from all liability under the bond, and a decree that the Defendant should deliver up the bond to be cancelled, and the costs of the suit.

Feb. 2nd &
 18th.

LEYCESTER v. LOGAN.

Shipping—
 Merchant
 Shipping Act,
 1854—17 &
 18 Vict. c.
 104, ss. 504
 & 514—
 Admiralty
 Court—
 Judgment of,
 condemning
 Ship—Pro-
 ceedings in
 Rem—
 Injunction—
 Costs.

IN September, 1836, a collision took place between the British steam-ship *Falcon*, of which the Plaintiffs were the registered owners, and a sailing ship called the *Imogene*. Shortly after the collision, the *Imogene* foundered and was totally lost. The cargo and some of the passengers' luggage were lost with the ship.

The Plaintiffs admitted, that, in respect of the loss of the *Imogene*, they were answerable in damages to the extent

The provisions of the 504th section of "The Merchant Shipping Act, 1854" (17 & 18 Vict., c. 104), limiting the liability of a ship-owner to the value of his ship and freight; and the provisions of the 514th section of the same Act, giving the Court of Chancery jurisdiction to stop actions and suits pending in any other Court in relation to the same subject matter, are applicable, notwithstanding the circumstance that an adverse claimant has obtained a definitive sentence or judgment of the Court of Admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share rateably with the other claimants in the value of the ship and freight.

But this Court has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, and retaining out of the proceeds such costs as he may be entitled to retain under the order of the Admiralty Court.

Subject, however, as abovementioned, the ship-owner is entitled to an injunction, under the 514th section of the Act, restraining the party who has obtained such a judgment from proceeding further in the Court of Admiralty.

and in manner mentioned in Part IX of the Merchant Shipping Act, 1854 (that is to say), to the extent of the value of the *Falcon*, and the freight due or to grow due in respect of that ship during her then voyage. They also admitted that the value of the ship and freight was insufficient to answer all the claims made or which might be made against them in respect of the loss of the *Imogene*.

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 v.
 LOGAN.
 Statement.

Several actions were commenced against the Plaintiffs in the Admiralty Court of *London*, by the owners of the *Imogene*, by owners of part of the cargo, and by certain of the passengers. And in one of such actions, which had been commenced by the Defendant *Logan*, judgment was obtained, whereby the Plaintiffs were condemned in the damages and losses consequent on the collision, with costs. The *Falcon* was arrested by process of the Admiralty Court, and was still under arrest and liable to be sold. The other actions were still pending.

The Plaintiffs now filed their bill to have the value of the *Falcon* and her freight ascertained, and apportioned between the persons who should establish their claims thereto; and praying that the Defendants might be restrained by injunction from prosecuting the actions commenced by them, and from commencing any other actions; and in particular, that the Defendant *Logan*, who had obtained judgment in his action, might be restrained from proceeding to a sale or taking any proceedings to compel or procure a sale of the *Falcon*.

Mr. *Cairns*, Q. C., and Mr. *Baggallay* now moved for a decree as prayed by the bill.

Argument.

Mr. *Cole*, in the absence of Mr. *Rolt*, Q. C., for the Defendant *Logan*, contended that the Defendant, having asserted his rights *in rem*, and having obtained possession

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 —
 Argument.

of the ship by the judgment of the Court of Admiralty, for the purpose of satisfying his debt and costs, the ship could not be taken from him by any proceeding in this court. He was entitled to retain the ship as a security for the full amount of his loss, as well as his costs.

The action in the Court of Admiralty was not an action "pending," within the meaning of the 514th section of the Act, inasmuch as the Defendant had obtained a definitive sentence of that Court.

Besides, the object of the Act was not to deprive the persons injured of any remedy they may have *in rem*, and which they may assert in the Court of Admiralty, but only to protect the owner from personal liability. The case was one for which the Act had failed to provide.

He cited *Ex parte Rayne* (a), to shew, that, notwithstanding the provisions of the 53 Geo. 3, c. 159,—the Act then in force for limiting the liability of ship owners,—the owner of a ship might be condemned personally in the costs of recovering compensation, although he might thereby become answerable for more than the value of his ship and freight; and the case of the *Saracen* (b), to shew that the party who has obtained a decree like the present in the Court of Admiralty, cannot be deprived of his priority, and that a decree of that Court is final.

Mr. Druce for other Defendants who had actions pending.

Mr. Cairns, Q. C., in reply, submitted to pay the costs of the Defendant Logan in the Court of Admiralty; but disputed his right, in respect of the loss he had sustained by the collision, to more than his share, rateably with the other

(a) 1 Q. B. 982. (b) 10 Jur. 396; *S.C.*, on appeal to P.C., 11 Jur. 253.

parties injured, to the value of the ship and freight. He cited *Hill v. Audus* (a), and *Dobres v. Schröder* (b).

Judgment reserved.

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v.
LOGAN
—
Argument.

The VICE-CHANCELLOR SIR W. PAGE WOOD:—

Feb. 18th.

Judgment.

As regards all the Defendants except *Logan*, this case is extremely simple. But as regards *Logan* it is in a somewhat different position. *Logan* has taken proceedings in the Admiralty Court, and has obtained a judgment of that Court condemning the ship, for the purpose of answering his debt and costs; and it was insisted on his behalf by Mr. *Cole*, by whom the case was very ably argued, that, having asserted his rights *in rem*, and having obtained possession of the ship by the judgment of the Court of Admiralty, for the purpose of satisfying his debt and costs, the ship cannot be taken from him by any proceeding in this court, and he is entitled to retain the ship as a security for the full amount of his loss as well as his costs.

The general scope of the Merchant Shipping Act is sufficiently clear. Following the provisions of many previous Acts, from about the time of George the Second downwards, but in some respects deviating from those provisions, and leaving to this Court a larger discretion with respect to the orders it might make, the Legislature, by this Act, intended to provide that in no case should the ship owner, unless there were personal default on his part, be liable for more than the value of his ship and freight, in respect of any losses which might be occasioned by the circumstance of his ship having run down or injured other ships. Those pro-

(a) 1 K. & J. 263.

(b) 2 My. & Cr. 489.

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Judgment.

visions are very clearly and explicitly contained in the 504th section of the Act, which says distinctly, that this shall be the limit of the owner's liability. Then, in order to secure to ship owners that limitation of liability, and to obtain for them the full benefit of having the whole case settled at once, on their placing themselves in a position to pay or to secure, as the Court may direct, the value of the ship, the 514th section provides, that in cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made in respect of such liability, there, subject to the right thereinbefore given to the Board of Trade for other purposes, it shall be lawful for the Court of Chancery to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for the Court to stop all actions and suits pending in any other court in relation to the same subject matter.

It was contended, on the part of the Defendant *Logan*, first, that the action in the Court of Admiralty was not a "pending action" within the meaning of the 514th section, inasmuch as he had obtained a definitive sentence therein; and, secondly, that the object of the Act was not to deprive the persons injured of any remedy which they might have *in rem*, and which they might assert in the Court of Admiralty, but only to protect the owner from personal liability; and, therefore, that, the Defendant having obtained this judgment, he is not to be deprived of the fruits of it. The case, it was said, was a *casus omissus* in the Act; the owner, therefore, must be left to the liability which the ship is now under, and the only protection he can claim is against what Mr. *Cole* termed his "personal liability."

Now, I apprehend that the argument of personal liability, as contra-distinguished from the liability of the ship, is one which cannot be maintained. The liability of the ship,—that is, the liability of the shipowner to have his ship confiscated for the purpose of making good the damage inflicted,—is a liability to which the owner is exposed; and it never could be contemplated by the Legislature, that the owner should be liable to a suit which the Legislature must have known might at any time be instituted in the Court of Admiralty for the purpose of having his ship sold, and should after that be again liable to make good the whole value of the ship to any person who might sue him. There is no provision in the Act which in any way justifies the supposition that the Legislature had any such intention. It would be a very strange construction of the Act with regard to the liability of shareholders in joint stock banks—for instance, in the case of an Act providing that shareholders should be liable to the extent of their respective shares, and at the same time giving the directors a lien on those shares for debts of the shareholders,—to say that if the directors, by virtue of such lien, were to sell the shares, the personal liability of the shareholders would still remain, *ultra* the shares, to the whole amount which they might have subscribed. And again, in the case of a mortgage, with a contract that the mortgagor should be liable to the full value of the mortgaged estate, it would be a strange doctrine to maintain in this Court, that, if there were a foreclosure and sale, the mortgagor would still continue liable in respect of the mortgage debt. That, therefore, is an argument which cannot be maintained by the Defendant *Logan*; and, notwithstanding his judgment in the Court of Admiralty, the utmost to which he is entitled in respect of the loss he has incurred by the collision, is to share rateably with the other parties in the value of the ship and freight.

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Judgment.

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—
Judgment.

To a certain extent, the Defendant *Logan* has obtained an advantage over his co-Defendants by means of the sentence of the Court of Admiralty, since that sentence has given him the security of the ship for his costs, and that security is one with which the Act does not enable me to deal. The Act enables the shipowner to protect himself from the costs of numerous actions, the 514th section providing that he may apply to this Court to stay such actions, and to have the amount of his liability ascertained; but as to any control to be exercised over the ship itself, the Act is silent. And I apprehend this Court could not exercise any such control, except by way of annexing a condition in granting the relief sought. If the ship were still the property of the owner, and in the possession of the owner, and not subject to the process of the Court of Admiralty, it is possible this Court might have imposed some condition upon the owner, and declined to grant him the relief he has sought, except on the terms of his pledging the ship by way of security. But I do not see any way in which the Act has given this Court any control over the ship itself.

This circumstance removes the case from the application of any arguments from the analogy of the course of proceeding in creditors' suits. The truth is, there is no such analogy. In creditors' suits, the ground upon which one creditor is enabled to stay proceedings by another after bill filed, is that this Court retains the assets of the testator as a common fund, out of which all creditors ought to be paid rateably. A decree being once made for the administration of that common fund rateably, then, for the benefit of all the creditors, the other suits are stopped; so that it was at one time even doubted whether the executor could apply for an injunction, although it was afterwards determined that he could. But in this case there is nothing of the kind. Here the ship is not made a common fund out

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 Judgment.

of which the creditors can obtain payment of their debts, but the Act simply gives the owner the power of protecting himself, as provided by the 514th section. The argument, if any, from analogy, is all in favour of the Plaintiff; because, in a creditors' suit, if the judgment at law be only one which affects the goods of the testator, and not a judgment for satisfaction *de bonis propriis*, this Court interferes, and prevents the creditor from suing, just as much after judgment, as in other cases before judgment. When the judgment is *de bonis propriis*, the Court does not interfere, because then the liability becomes the personal liability of the executor. But in truth there is no analogy whatever between that course of proceeding and the present.

All that I have here to consider is, whether, the circumstance of there having been a final judgment, a sentence pronounced by the Court of Admiralty prevents the exercise of the jurisdiction which the Act has given to this Court, of stopping "actions and suits *pending* in any other court in relation to the same subject matter" (a). In reference to that question, the case of *Dobree v. Schröder* (b) is an authority (although the point was not argued—I suppose because no one thought the contrary could be successfully maintained), that, after judgment recovered at law, this Court will interfere. In that case, two judgments had been recovered at law, and yet the jurisdiction was exercised by this Court. The course at law—and I have looked at several of the cases at law for this purpose—is this:—After the judgment there is a writ of inquiry to ascertain the damages, and, if necessary, the value of the ship. What would be the right course to be taken if the value of the ship had been realised, is another question; but so long as that has not been done, it appears to me that it would be clearly a narrow construction of the word "pending," in

(a) Sect. 514.

(b) 2 My. & Cr. 489.

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the 514th section of the Act, to hold that the owner is precluded from applying to this Court, under the Act, to prevent the ship from being disposed of in any other way than according to the Act, namely, so as to limit his liability to the amount of the value of the ship at the time of the collision, and the value of the freight.

The question is, what is to be done now that the ship is under sentence of the Court of Admiralty, and the Defendant *Logan* has obtained that security for his rateable share of the amount to be paid, and for the costs of his suit in that Court. And it seems to me, that the right course to take is this: regard being had to the position in which the ship now is, namely that it is not in the control of the Plaintiff, and that it is not as I conceive under the control of this Court, but under that of the Court of Admiralty, the only restriction I can impose on the Defendant will be, to take care that he does not realise more than he is entitled to realise in respect of his security, namely the amount of his costs in the Court of Admiralty, and the amount of his share rateably with the other parties who have been injured in respect of the loss he has sustained.

Logan has a lien on the ship for the amount of his costs in the Admiralty Court, and those costs should be paid into Court, as well as the extra value of the ship at the time of the collision, for the benefit of the other persons who have incurred loss by the collision.

The Defendant *Logan* must be at liberty to sell the ship, and to retain out of the proceeds such costs as he is entitled to under the order of the Court of Admiralty; and upon such sale being made, he and all other parties must concur in all necessary acts for the transfer of the balance into court.

The Plaintiff must pay into court the extra value of the ship at the time of the collision, as compared with the pre-

sent value, the estimated costs of the Defendant *Logan* in the Admiralty Court, and the value of the freight. There will then be precisely the same inquiry as to the value of the ship as in the case of the *African Steam Ship Company v. Swanzy* (a). Then an injunction restraining the Defendant *Logan* from proceeding in the Admiralty Court, subject to his being at liberty to sell the ship, and to retain out of the proceeds such costs as he may be entitled to retain under the order of the Court of Admiralty. And an injunction restraining the other Defendants from proceeding in the Admiralty Court until further orders; with liberty to any party to apply.

Decree accordingly.

(a) 2 K. & J. 660.

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—
Judgment.

IN RE HUNGERFORD'S TRUST.

July 4th.

PETITION for payment to the Petitioner of the income of a fund arising from the sale of lands to a railway company.

*Practice—
Railways—
Lands Clauses
Consolidation
Act—8 & 9 Vict.
c. 18, s. 79.
—Incumbrances—Service
of Petition.*

At the time of the sale, the Petitioner was in possession of the lands as tenant for life, subject to certain mortgage debts created by himself.

Upon a petition for payment to the Petitioner of the income of a fund arising from the sale of land to a Railway Company, the Petitioner being in possession at the time of the sale as

The company objected that the order could not be made unless the mortgagees were first served with the petition.

Mr. *Schomburg*, for the Petitioner, submitted that service on the mortgagees was unnecessary.

tenant for life, subject to mortgages created by himself, the Court will make an order, without requiring the mortgagees to be served with the Petition.

But *scilicet* such service could not have been dispensed with, in case the tenant for life had been out of possession at the date of the sale.

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In re
HUNGER-
FORD'S TRUST.

Judgment.

The VICE-CHANCELLOR SIR W. PAGE WOOD thought, that, if the Petitioner had been out of possession when the land was sold, the incumbrancers ought to have been served; but inasmuch as they had allowed him to be in possession, such service was unnecessary. It was their business to look after their own security.

July 4th.

IN RE MORTLOCK'S TRUST.

Will—Con-
struction—
Absolute Gift
—Power.

Bequest to
two persons
“in two equal
parts, each for
his and her
sole use and
benefit, and
to be disposed
of as each of
them pleases,
at their death,
or if not so
disposed of, to
be equally
divided at
their deaths
between their
children.”
Held, an ab-
solute gift of
the principal.

MARY ANNE MORTLOCK, by her will dated 1850, after directing all her property to be converted into money, bequeathed one-fifth part thereof “to the Rev. Charles Mortlock and to Mrs. Rawlins” (meaning the Petitioners), “in two equal parts, each for his and her sole use and benefit, and to be disposed of as each of them pleases at their death, or if not so disposed of, to be equally divided at their deaths between their children as they respectively attain the age of twenty-one years.”

A sum of 1,158*l.* 19*s.*, 3 per Cents, having been paid into court by the executors in respect of this bequest, the Petitioners prayed that the same might be sold and the proceeds paid to them in equal moieties.

Mr. *H. Stephens* for the Petitioners, contended that this was an absolute gift of the fund to them, citing *Hales v. Margerum* (a), *In re Yalden* (b), and the cases there cited, and *Tomlinson v. Dighton* (c).

Mr. *Martindale*, for the executors and for children of the Petitioners, contended, that, having regard to the terms of the bequest and the gift over, the Petitioners took, not an

(a) 3 Ves. 299.

(b) 1 D. M. G. 53.

(c) 1 P. Wms. 149.

absolute interest, but each of them a life interest only, with a power of disposing of the principal; subject to the exercise of which power, the children were entitled.

A reply was not heard.

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In re
MORTLOCK'S
TRUST.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

The rule is, that where there is an absolute gift by will, followed by words sounding like a power, with a gift over if it be not exercised, there the Court gives effect to the absolute gift as such, and the gift over is held inconsistent with that absolute gift, and therefore void.

The only question that could arise is, whether a like construction would be put upon a bequest where the exercise of the power is required to be by will, or whether, in such a case, the bequest would not be cut down to a life interest in the donee, with a power for him to appoint by will. But the question, how such a bequest might be construed, does not arise here, for here the words are "to be disposed of as each of them pleases *at their death*," words which would be satisfied not merely by an appointment by will, but by an appointment by instrument inter vivos, to take effect at the death.

That being so, the bequest is in truth nothing more than that which came before the Lords Justices in *Re Yalden* (a), where the words were "by will or otherwise," which could admit of no doubt.

I must, therefore, hold that the Petitioners took absolute interests in the fund in question (b).

(a) 1 D. M. G. 53. (b) Vide *Barton v. Barton*, infra, 512.

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June 26th &
July 3rd.

JOEL v. MILLS,

HARVEY v. MILLS.

Devise—Equitable Life Estate—Proviso for Cesser—Restraint on Alienation—Appointee—Equity to secure Fund—Trustees—Discretion.

A direction in a will, that an equitable life interest in real estate thereby devised shall cease and determine if the devisee should attempt to alienate it, is valid, whether there be a gift over of his interest on that event or not.

A testator empowered and directed the trustees of his real estate to raise, by mortgage thereof, any sum not exceeding 20,000*l.*, and to apply the same in paying such of the creditors of *M.* as they should think fit. The trustees raised 6,000*l.*, and in their answer to a bill by a judgment creditor of *M.* to enforce his lien, they stated that they had raised this sum, but had not further exercised their power, and refused to do so except under the direction of the Court. They then filed a bill to have the trusts carried into execution by the Court, and to this bill they made the judgment creditor a party, and stated in it that they intended to raise the whole 20,000*l.*—*Held*, that the judgment creditor had an equity to sue to have the fund raised secured, if not by the whole 20,000*l.* raised and distributed; and that the trustees were bound, if not by the will, by their answer and the statement in their bill, to raise the whole 20,000*l.* Whether they had not given up their power of selection among the creditors—*Quære*.

THE Reverend *Robert Davers*, by his will, dated in 1852, appointed Lord *Arthur Charles Harvey* and the Reverend *Frederick Gould*, executors, and bequeathed to his wife *Mary Davers*, for life, an annuity of 200*l.*, and devised to her a certain messuage in fee. And he devised to his said executors and their heirs all the rest of his real estate, upon trust, in the first place, with the rents and profits thereof, to pay the said annuity, and upon trust to apply the residue of the rents and profits of the said hereditaments in paying the incumbrances thereon, so far as the personal estate should not be able to pay the same; but, nevertheless, he authorised and empowered his said trustees, their heirs and assigns, to pay and allow to *Charles Sydney Davers Mills* "the sum of 300*l.* a year for his maintenance, in one or more sum or sums of money, and at such times and in such proportions as my said trustees hereinbefore named, their heirs or assigns, shall think expedient, and so that the same shall not be anticipated, mortgaged, or assigned by the said *Charles Sydney Davers Mills*, nor be liable to the debts or engagements of the said *Charles Sydney Davers Mills*; with liberty for them

the said Lord *Arthur Charles Harvey* and *Frederick Goold*, their heirs and assigns, to withhold the payment of the same, either in part or wholly, at their or his discretion; and from and after the payment of the same and incumbrances, that they the said Lord *Arthur Charles Harvey* and *Frederick Goold*, their heirs and assigns, shall and do pay and apply the rents and profits of the said hereditaments to the said *Charles Sidney Davers Mills*, or apply the same for his benefit for his life, subject to the proviso hereinafter contained. Provided always, and I do hereby declare, that if the said *Charles Sidney Davers Mills* shall alienate or dispose of the said annual produce, income, or rents, or any part thereof, or his estate and interest therein, or of and in the said hereditaments, or if by reason of his bankruptcy, insolvency, or by any other means whatsoever, the said rents and profits of the said hereditaments, or the said hereditaments, can no longer be personally enjoyed by the said *Charles Sidney Davers Mills*, but the same or any part thereof would belong to or become vested in some other person or persons, then the trusts hereinbefore expressed concerning the said rents and profits, or concerning so much thereof as shall or would have become vested in any other person or persons, other than the said *Charles Sidney Davers Mills* as aforesaid, shall immediately thereupon cease and determine, and the same rents and profits shall be applied by my said trustees, their heirs and assigns, in manner following (that is to say), upon trust to pay and apply the rents, profits, and income, or such part thereof as aforesaid, to and for the maintenance or otherwise for the use and benefit of the wife, child, or children for the time being (if any) of the said *Charles Sidney Davers Mills*, or such one or more of such wife, child, or children (but subject to the provision hereinafter contained) and in such manner as the said Lord *Arthur Charles Harvey* and *Frederick Goold*, their heirs or assigns, in their or his discretion shall think proper, and as to such wife for her sole and separate and

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inalienable use, and in default of and subject to the last-mentioned trust, at any period during the life of the said *Charles Sidney Davers Mills*, and when and so often as the same shall happen, then upon trust from time to time so long as such vacancy or want of object shall continue, to accumulate and invest the annual produce and income of the said hereditaments in the funds, and turn the same into capital, and to accumulate in the nature of compound interest, and upon trust to apply the said rents and profits as may not lawfully be accumulated during such want of objects of the preceding trust as aforesaid, in such and the like manner as the same would be applicable under the trust hereinafter mentioned if the said *Charles Sidney Davers Mills* were then actually dead. And from and after the decease of the said *Charles Sidney Davers Mills*, upon trust to stand seised and possessed of the said hereditaments" for the first and other sons of the said *Charles Sidney Davers Mills*, successively in tail male, and for default of such issue upon trust to sell and to stand possessed of the moneys to arise from such sale, and of the rents and profits of the said estates until sale, upon trust for all and every the children and child of his sister Dame *Frederica Osborn* (except *George Osborn* her eldest son), to be equally divided between them as tenants in common, to be vested interests in them respectively at the time of the decease of or failure of issue male of the said *Charles Sidney Davers Mills*. "Provided also, and notwithstanding any of the trusts and limitations hereinbefore contained, it shall be lawful for, and I hereby direct, authorise, and empower the said Lord *Arthur Charles Harvey* and *Frederick Goold*, and the survivor of them, and the heirs and assigns of such survivor, and the trustees or trustee for the time being of this my will, to raise, by mortgage of all or any part of my manors, messuages, and hereditaments hereinbefore devised to them, any sum or sums of money not exceeding in the whole the sum of 20,000*l.*, and pay and apply the same for and towards

the liquidation and satisfaction of such of the debts or engagements of the said *Charles Sidney Davers Mills*, as they the said Lord *Arthur Charles Harvey* and *Frederick Goold*, or the survivor of them, or the heirs and assigns of such survivor, or the trustee or trustees for the time being, shall deem expedient and proper;" with the usual powers of executing deeds and giving receipts for the purpose of effecting any such mortgage or mortgages. "Provided also, that it shall and may be lawful for the said Lord *Arthur Charles Harvey* and *Frederick Goold*, and the survivor, his heirs and assigns, and for the trustee or trustees for the time being, to sell and cut down timber in my woods and on my estate, and to sell and dispose of the same; and the moneys arising from such sale are to be paid and applied in diminution of the said sum of 20,000*l.* to be borrowed as aforesaid, so that by the sale of the timber and the mortgage the sum of 20,000*l.* only is to be raised for the purposes aforesaid." And the testator bequeathed to the said Lord *Arthur Charles Harvey* and *Frederick Goold* all the residue of his personal estate, upon trust to collect and convert the same as therein mentioned, and with and out of the proceeds to pay all debts due and owing from him on private contract, his funeral and testamentary expenses, and legacies, and in the next place to pay and apply the remainder thereof in discharge of all sums of money due from him on mortgage of his said real estates thereinbefore devised, or any part thereof; but he made no bequest of the beneficial interest in his residuary personal estate by his will.

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Statement.

On the 22nd of January, 1853, the testator made a codicil, which, so far as material, was as follows:—"Whereas I have, in and by my said will, directed and authorised my trustees therein named, their heirs and assigns, to pay the residue of the rents and profits of my real estate, after payment of certain annuities therein mentioned, unto *Charles Sidney Davers Mills* therein named, during his life, or

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otherwise apply the same for his benefit: Now I do hereby declare my will to be, that it shall be lawful for my said trustees, their heirs and assigns, to pay the same residue of rents and profits of all my real and personal estate unto or for the use or benefit of the said *Charles Sidney Davers Mills*, in such a sum and sums of money, at such time and times, and in such proportions, as my said trustees, their heirs or assigns, shall think expedient, and so that the same shall not be anticipated, mortgaged, or assigned by the said *Charles Sidney Davers Mills*, nor be liable to and for his debts or engagements, with liberty to withhold the payment of the same, either in part or wholly, at their or his discretion; and, in case my said trustees, their heirs and assigns, shall at any time or times withhold absolutely and for ever from the said *Charles Sidney Davers Mills* the payment of the said annuity and of the said remaining rents and profits, or of either of them, or of any part thereof, the said sum and sums of money so withheld shall remain and be part of my estate, and be applied upon the same trusts as are declared or referred to, and in like manner and order of succession as hereinafter mentioned; and if, by reason of the said *Charles Sidney Davers Mills* alienating or disposing of, or attempting to alienate or dispose of, the said remaining rents, or any part of his estate and interest therein, or of and in my said estate, or if, by reason of bankruptcy or insolvency, or of any other means whatsoever, the said remaining rents and profits thereof, or any part thereof, would but for the provision following belong to or become vested in some other person, then the trust concerning the same remainder of the said rents and profits, or concerning so much thereof as should or would have become vested in any other person or persons other than the said *Charles Sidney Davers Mills* as aforesaid, shall immediately cease and determine, and the said remaining rents and profits shall be applied upon the trusts and for the intents and purposes mentioned, expressed, and declared thereof in and by my said will: and I here-

by confirm my said will in all respects as the same is not hereby altered."

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The testator's personal estate was insufficient to pay his own debts.

A judgment-creditor of *Mills* filed the bill in the first suit, to enforce his lien against such interest as *Mills* might have under the will and codicil.

By their answer in that suit, the trustees of the will stated that they had raised the sum of 6,940*l.* by the sale of timber upon the said estates towards payment of the debts of *Mills*, but had not exercised their power of raising money by mortgage for such purpose given to them by the will; and they stated that they refused to comply with such direction, and to exercise such power except under the direction of the Court.

Subsequently to putting in this answer, the trustees filed the bill in the second suit, making *Joel* a Defendant to it, and they in such bill stated that they intended to raise as much of the 20,000*l.* as the estates would suffice to raise, and prayed that the trusts might be carried into execution by the Court.

Mr. *Willcock*, Q. C., Mr. *Southgate*, and Mr. *E. E. Kay* for the Plaintiff in the first suit. Argument.

The codicil confers on *Mills* an absolute interest in the real estate; and the restrictions upon his power of alienation are repugnant and void. The testator, having by the will given to *Mills* an annuity of 300*l.*, and then the rest of the rents for life, with a proviso that his interest in the remaining rents should cease on his attempting to alien them, evidently considered that his purpose would be answered

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equally well by giving *Mills* the fee-simple, and attaching to it a conditional limitation, under which the trusts of the will were only to come into operation if he should attempt to alien his interest. This is clear from the recital with which the codicil commences, that he had by the will given a life interest, which implies that by the codicil he was about to make a different disposition, and then by his using words of gift which would confer a fee-simple without words of limitation (1 Vict., c. 26, s. 28, and interpretation clause), though only of the rents, *Plenty v. West*(a), and by his coupling with the rents of the real estate the income of the personal estate, as to which he makes no further direction, and which beyond question was given by the same clause to *Mills* absolutely. This construction is now necessary by the 28th sect. of 1 Vict., c. 26, unless a contrary intention appear by the codicil; and no such contrary intention does appear in this case, but the rest of the codicil strongly confirms this construction. For, not only is there the fact of the bequest of the personal estate, but, a power being given to withhold the rents, what is so withheld is to go *in succession* as after mentioned, which implies that otherwise there would be no successive interests; and then the proviso against alienation is repeated, which would be useless and absurd if the life estate given by the will were to remain, for to that estate the will had attached a similar proviso. Then the codicil provides, that, in the events mentioned in the conditional limitation taking effect, the rents are to be applied upon the trusts &c. directed by the will, which clearly proves that the will was to have no effect until the events mentioned in the codicil had happened. Upon this construction, the only omission in the codicil was words of limitation in the gift to *Mills*, and these are not now necessary: but any other construction would make a great part of the codicil useless or absurd. Then, if the codicil conferred a fee-simple, any

(a) 6 C. B. 201; and 16 Beav. 173.

restriction of the devisee's right of alienation, whether by way of condition or conditional limitation, is repugnant and void, because it is contrary to the policy of the law to give a man only the semblance of an estate which shall go from him when he seeks to deal with it as his own (a): and this objection applies with exactly the same force to a conditional limitation or executory devise, by which the estate is made to go over to another, as to a condition by which it is made to revert to the grantor. And, accordingly, it has been decided that such a conditional limitation attached to an absolute interest is void, both as to personalty, *Bradley v. Peixoto* (b), and also as to realty, *Ware v. Camm* (c).

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Then, as to the annuity of 300*l.*—By the will, power is given to the trustees to withhold this, or any part of it, and there is a like proviso that *Mills* shall not alien it; but there is no gift over of what they may withhold or of what he may attempt to alien, nor is there as to the remaining rents, which by the joint effect of the will and codicil, if the latter did not give the fee simple to *Mills*, are, on his attempting to alien them, if he has no wife or children, to be accumulated for twenty-one years, and it is not said to whom these accumulations are to belong. No case has yet decided that a condition that a life interest shall cease on alienation, is valid. It was obviously an innovation upon the rule, to allow a gift over of a life interest upon an attempted alienation by the tenant for life to prevail. It seems as inconsistent with the policy of the law that a tenant for life should be deprived of the incidental right of selling his interest, as that a tenant in fee should be; and a conditional limitation on his attempting to sell, as effectually cripples his power of doing so as a condition. But it is settled that a life interest may be made to determine on attempted alienation, when limited by a will in which, either

(a) See Co. Litt. 223. a. (b) 3 Ves. 324. (c) 10 B. & C. 433.

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expressly or by implication, there is a gift over on that event. That, however, is the utmost limit to which the decisions on this point have gone. A mere proviso, that, upon an attempted alienation by the tenant for life, his life estate shall cease, is a simple condition, by which the life estate would cease for the benefit of the grantor or testator or his heirs, and this is void by the rule founded upon the policy of the law. Therefore, in this case, the provisos for cesser of the annuity and accumulation of the surplus rents on attempted alienation are void, and the life interests in these are absolute. *Younghusband v. Gisborne*(a) shews how little such attempts to give property to a man so that his creditors shall have no interest in it, are favoured in this Court. See also *Snowden v. Dales*(b), *Piercy v. Roberts*(c), *Green v. Spicer*(d), *Pym v. Lockyer*(e).

But, whatever may be the opinion of the Court upon these points, the trustees are bound to raise 20,000*l.* out of the estates for the benefit of *Mills's* creditors: the will directs them to do this, and by their own bill they say they intend to do so, while by their answer in this suit they give up their power of selecting which of the creditors shall be paid; and accordingly the Court will distribute the fund among creditors according to their degree.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The first part of this will contains a clear direction to the trustees to pay out of the rents of the testator's real estate an annuity to his widow, and then to pay thereout the incumbrances upon his real estate in aid of his personalty; and then to pay an annuity to *Mills*, and to pay the remainder of the rents to him for his life, subject to the

(a) 1 Coll. 400.

(b) 6 Sim. 524.

(c) 1 M. & K. 4.

(d) 1 R. & M. 395.

(e) 5 My. & Cr. 29.

proviso thereafter contained. It seems to have occurred to the testator that *Mills* might be starving while the rents were being applied in payment of the incumbrances; and therefore, notwithstanding the trust for their payment, he authorised and empowered his trustees to pay to *Mills* the annuity of 300*l.* for his maintenance, in one or more sum or sums of money, and at such times and in such proportions as they should think expedient, and so that the same should not be anticipated, mortgaged, or assigned by *Mills*, nor be liable to his debts or engagements, with liberty for the trustees to withhold the payment of the same, either in part or wholly, at their discretion; and, from and after the payment of the same and the incumbrances, he declared that they should pay the rents and profits to *Mills*, subject to the proviso thereafter contained.

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I think that the distinction which it was attempted to draw in argument between the annuity and the remainder of the rents, does not exist. The trust is, to pay an annuity to the wife, and then to pay the incumbrances, with an ultimate trust as to the remainder of the rents for *Mills* for life, and with a power overriding the whole trust, if the trustees should think fit, to pay him 300*l.* a year for his maintenance—that being merely a part of the interest given to him in the rents and profits—and the whole is subject to the proviso thereafter contained, that if *Mills* should alienate or dispose of the said annual produce, income, or rents, or any part thereof, or his estate or interest therein, or of and in the said hereditaments, or if, by reason of his bankruptcy, insolvency, or by any other means whatsoever, the said rents and profits of the said hereditaments, or the hereditaments, could no longer be personally enjoyed by *Mills*, but the same or any part thereof would belong to or become vested in some other person or persons, then the trusts thereinbefore expressed concerning the said rents and profits, or concerning so much thereof as should or would have become vested in any other person or persons than

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Mills, should immediately thereupon cease and determine. That proviso clearly applies to the event which has happened. *Mills* was to have the rents during his life subject to that proviso, which is, that, if such a thing should take place as now has taken place, by his allowing a registered judgment to be obtained against him, the trusts for his benefit should cease. I therefore think that the proviso for cesser has taken effect.

I am of opinion that such a proviso for cesser would be valid, whether there be a gift over of the trust property upon the event happening, or not. In *Rochford v. Hackman* (a) that point was much considered by Lord Justice *Turner*, and he signified his approval of the case of *Dommett v. Bedford* (b), which was very like this case. There *T. Bedford*, clerk, deceased, gave to his niece an annuity of 30*l.* for life, with a proviso, that, if the same should be alienated, it should immediately thereupon cease and determine; and he gave in the same words to *Bedford Woodham*, by whose assignees the suit was instituted, an annuity of 30*l.* during his life, with the same direction, the proviso for cesser being the same as that which was attached to the first gift; and, subject to this, he charged his real estate with the payment of the annuity, and devised it over; and so far in one sense it may be said there was a gift over upon the ceasing of the annuity; but I think that such would be a strange construction of the will and of the effect of the judgment, which appears to be, clearly, that, upon the event mentioned in this proviso happening, the annuity had ceased. A case was directed for the opinion of the judges, as to whether the annuity had ceased by the bankruptcy of *Woodham* and the consequent assignment of his effects to assignees, and they gave their judgment by a certificate, which was signed by them, that by such bankruptcy and assignment

(a) 9 Hare, 475.

(b) 6 T. R. 684.

the annuity had ceased and determined. I see no reason in law why an annuity should not be made to cease by a proviso of this kind.

Then, looking on further in the will to see whether there is anything which militates against this construction, I find that the testator directs that the same rents and profits should be applied by his trustees upon trust to pay the same, or such part thereof as aforesaid,—which means such part as would but for the proviso have become vested in some other person,—for the benefit of the wife or children of *Mills*, and, in default thereof, during the life of *Mills*, to accumulate the same in the nature of compound interest. It is true that the testator does not say for whose benefit that accumulation is to take place; but, if the true construction of the previous clause is that the interest of *Mills* has ceased and determined, I cannot come to the conclusion that there is any fresh gift by this clause for his benefit: possibly his wife or children might have a claim to the accumulations, or they may be the property of the testator's heir; but what right have I to hand over this accumulated fund to *Mills*, if his interest in the rents and profits was determined by the previous clause. The will then proceeds to direct the application of the rents and profits which might not lawfully be accumulated, as the same would be applicable under the succeeding trust if *Mills* were then dead, and that, after the decease of *Mills*, the trustees should stand possessed of the hereditaments for his first and other sons successively in tail male, and, for default of such issue, for the children of *Dame Frederica Osborn*. Another question may be raised as to the surplus rents and profits, if *Mills*, having forfeited his interest, should live for more than twenty-one years after the death of the testator, and should not have a wife and children. It might be a question of some difficulty in such a case, as the rents which accrued after the twenty-one years were to be dealt with as if *Mills* were

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dead, whether such rents would belong to the ultimate devisees, who seem to take no interest except on *Mills's* death without issue, or whether they should belong to the testator's heir; but, whatever might be the argument in such a case, I am not justified, under the present circumstances, in raising a new trust as against the testator's heir, for the benefit of *Mills*, whose interest has ceased under the proviso, because certain limitations are made for the benefit of the wife and children, which might have exhausted the whole.

The codicil does not seem to me to vary the matter in any way. I think the object of it is plain. The testator perceived that he had not by his will given quite the same precise directions as to withholding during the life of *Mills* the remainder of the rents and profits, as he had given concerning the annuity. He appears to have been induced to attempt to do that which was a lawful object on his part, namely, to give to *Mills* an interest, without giving anything to his creditors. He had given to the trustees power to withhold the annuity at their pleasure, and, after the payment of the same and incumbrances, he directed them to pay the rents and profits to *Mills*, subject to the proviso thereafter contained; but he did not give them power to withhold all or any part of these remaining rents, nor had he directed what should be done with such part of the annuity as they might choose to withhold; but the savings of the annuity would, under the trusts of the will, have become a part of the surplus rents which were given for the benefit of *Mills*. By the codicil, he recites, "Whereas, I have in and by my said will directed and authorised my trustees therein named, their heirs and assigns, to pay the residue of the rents and profits of my real estate, after payment of certain annuities therein mentioned, unto *Charles Sidney Davers Mills*, therein named, during his life;" which is not a very correct recital, because he omits the direction contained in his will to pay off his incumbrances out of these

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rents: "Now, I do hereby declare my will to be, that it shall be lawful for my said trustees, their heirs and assigns, to pay the same residue of rents and profits of all my real and personal estate, unto or for the use or benefit of the said *Mills*, in such a sum and sums of money, at such time and times, and in such proportions, as my said trustees, their heirs or assigns, shall think expedient; and so that the same shall not be anticipated, mortgaged, or assigned by the said *Mills*, nor be liable to and for his debts or engagements." All that is new, so far as regards the residue of the rents and profits: "with liberty to withhold the payment of the same, either in part or wholly, at their or his discretion; and, in case my said trustees, their heirs and assigns, shall at any time or times withhold absolutely and for ever from the said *Mills* the payment of the said annuity, and of the said remaining rents and profits, or of either of them:" the will only gave power to withhold the annuity, and not the surplus rents; and here he gives power to withhold the surplus rents also; and then he proceeds to deal with what they might have withheld of the annuity, and also with what they might withhold of the surplus rents and profits under this provision in the codicil. [His Honour read the rest of the codicil.] The latter part of the codicil does seem in some degree to support the view that the annuity and the remaining rents and profits were kept distinct; but the testator by the codicil confirms his will in all respects as the same is not thereby altered; and it appears to me that nothing is altered by the codicil, except what is thereby expressly changed. By the clause in the will, if *Mills* should dispose of the annual rents and profits, or any part thereof, or his estate and interest therein, such interest was to cease and determine; and I think it is impossible to say that the annuity of 300*l.* was not part of his interest in the rents. The testator does in the codicil seem to draw some distinction between the annuity and the remaining rents; but that would not prevent the operation of the original proviso in the will, by which the whole interest of *Mills* in the rents

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and profits ~~was~~ to cease and determine. The codicil refers back to the will, and upon such ceaser the rents must be accumulated: such accumulation may or may not fall to the heir-at-law; but, if the testator has not distinctly directed what is to be done with those rents and profits, it does not follow that I am to revive the interest of *Mills* which has ceased under the proviso.

However, it was argued that by the codicil a fee-simple in the estate was given to *Mills*, and that these provisos must be rejected as repugnant: but I think that it is impossible upon the language of this codicil, independently of the doctrine laid down in *Graves v. Hicks* (α), to hold that the interests of the wife and children of *Mills*, and of the children of *Dame Frederica Osborn*, are to be defeated by any but the clearest expressions. I do not think that the words of this codicil can be so construed. It is true, that, in the codicil, the testator says, if the trustees shall withhold from *Mills* the rents absolutely and for ever, but that expression does not mean that he considers that *Mills* had a fee-simple estate, but only that what they should withhold absolutely from him should remain part of the testator's estate, and be applied upon the other trusts therein mentioned. That is the whole meaning of the words absolutely and for ever. To construe this codicil as giving *Mills* a fee-simple would be a mode of construction which would effectually defeat every intention manifest upon the face of it.

Then it was argued, that there was a complete life interest given to *Mills*, and that it was not competent to the testator to give him a life estate, and at the same time to give to the trustees the power of withholding the income from him or his assigns, on the principle that you cannot to a life estate attach a condition destroying it in case of an attempt at alienation any more than you can attach *such* a condition to an estate in fee-simple. But, I am of opinion

(α) 11 Sim. 536.

that I cannot consider *Mills* as having an absolute life interest under the provisions of this will and codicil. The rents are given to him for life, subject to a proviso after mentioned, which proviso is, that his interest in such rents is to cease on a certain event. As long as a man has property, it may be made liable to his creditors; but there is nothing inconsistent in saying, that, in the event of his allowing it to become so liable, his interest in it shall cease absolutely. The testator by the codicil makes an imperfect recital, which cannot alter the effect of what he had done by the will; and then he goes on to say, that, if the interest given to *Mills* should become vested in any one else, it shall cease and determine. I think that no distinction can be made between the annuity and the residue of the rents and profits given to *Mills*. The object of the codicil is simply to direct what should be done with so much of the annuity as the trustees may withhold, and to give them a further power of withholding the rest of the rents and profits; and all that is withheld is to remain and be part of his estate, and to be applied upon the trusts of the will: whether that is a limitation over or not does not seem to me to be material, because, in the event that has happened, the interest of *Mills* must be taken to have ceased.

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Mr. Rolt, Q. C., and Mr. Elderton, for the trustees; and Mr. Cairns, Q. C., and Mr. Lewin, for the persons interested under the ultimate limitation in the will—then argued that the trustees were not obliged to raise 20,000*l.*, and that they had not lost their power to apply so much as they might think fit to raise in payment of such of *Mills's* creditors as they might choose to select; and that, therefore, the Plaintiff had no equity to file a bill, because he might never become entitled to any of the fund raised.

Argument.

Mr. Headlam, Q. C., and Mr. Buxton, for *Mills*, took no part in the argument.

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The main question is, whether the Plaintiff is entitled to any decree; and I have no doubt that he is, whatever may be the ultimate result of the inquiries, for this reason: the will contains a direction to the trustees to raise by mortgage of all or any part of the hereditaments devised to them, any sum or sums of money, not that they may think proper, but not exceeding in the whole the sum of 20,000*l.*, and to pay and apply the same for and towards the liquidation and satisfaction of such of the debts or engagements of *Mills* as they should think expedient and proper, just stopping short of an actual trust for the benefit of *Mills*, to have raised for him any sum of money that might be required for payment of his debts. There is, in fact, a sum of money in hand actually raised by the trustees, amounting to upwards of 6000*l.*; and the question is, who are the cestuis que trusts of this money. They must be some of the creditors of *Mills*, who were such either at the death of the testator, or at the time of the decree; but there is given by the will a power to the trustees to select which of the creditors should be the objects of the testator's bounty. Suppose that they do not exercise this power, as in *Brown v. Higgs* (a), they cannot put the money into their own pocket. If it were a power to appoint among such of the next of kin of *A.* as *B.* should choose, any one of the next of kin of *A.* would be entitled to file a bill to have the fund secured, although the trustees might afterwards disappoint him, and say, you shall not have a share, until an appointment had been actually made under the power. Any one of the class of possible appointees would have a right to file such a bill. Therefore, the Plaintiff in this case may say, I may be entitled hereafter to share in the fund, and may therefore file his bill to have it brought into court. But I think his position is somewhat higher. Supposing that the sum of 6000*l.* would pay all the debts, including his, he would be like the sole

(a) 8 Ves. 574.

appointee in *Boyle v. The Bishop of Peterborough*, (a) he would have a right to a share in the money; and therefore it is impossible to contend that he has not a right to have the objects of the power ascertained. Moreover, I think, as one of the persons interested, whether he is now subject to be disappointed by an exercise of the power or not, he has a right to demand that any sum, not exceeding 20,000*l.*, which may be necessary to pay *Mills's* debts, shall be raised; for, upon the construction of the will, though it is not necessary to rely upon that after the statement in the bill of the trustees, but upon the will alone, the inclination of my opinion is, that *Mills* would have a right to say, that the trustees are not only empowered, but directed, to pay such of his debts as they may think proper up to the amount of 20,000*l.* leaving them to select such debts as they choose, if his debts altogether should exceed that sum. *Mills* has a right to say, raise that sum and pay such of my debts with it as you think fit. However, it is not necessary to rest upon the construction of the will alone, because the trustees, having stated by their answer in this suit that they wish to act as to their power of selection under the direction of the Court, have filed a bill in which they state that they intend to raise the sum of 20,000*l.*, or as much of it as they can.

I will leave open the question what creditors are entitled to come in, because it may turn out that the debts at the testator's death did not amount to 20,000*l.* That might not determine the construction of the will, but it may not be necessary to decide what creditors should come in, and it is not usual to make directions which may be unnecessary. Though I first thought that the debts of *Mills* referred to were such as he should owe at the death of the testator, I question now, whether it was not intended to include all his debts up to the time of executing the power.

(a) 1 Ves. jun. 229.

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of Decree.*

DECLARE that the interest of *Mills* in the rents and profits of the hereditaments devised by the will and codicil of the testator has ceased.

Dismiss so much of the bill in *Joel v. Mills* as seeks to establish any claim against such alleged interest in such rents and profits.

Inquire whether the sum of 20,000*l.*, or what part thereof, including the sum of 6,000*l.* already raised by the trustees, can be raised by mortgage of the testator's estate.

Inquire what debts are now due and owing from *Mills*, and to what persons respectively, and on what securities respectively, and which of such debts, or any and what part thereof, were or was due at the death of the testator.

Bring the 6,000*l.* into court, and place it to an account intitled "The Account of the Timber Money."

All these inquiries to be without prejudice to the question whether the trustees are now entitled to select what debts they will pay.

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11th, & 15th.

IN RE RAWBONE'S TRUST.

(RE-HEARING.)

*Bankruptcy—
"Order and
Disposition"—
Reversionary
Interest—
"Consent of
true Owner"—*

THE facts of this case are stated in the report of the original hearing, contained in an earlier part of this volume (a).

Laches—Legacy—Chose in Action—Notice.

A bankrupt's reversionary interest in a legacy: *Held*, upon rehearing, (following the authority of the Lords Justices in *Barilett v. Barilett*), not to be exempted from the rule as to "order and disposition," by the mere circumstance of such interest being reversionary at the time of the act of bankruptcy.

But to bring such an interest within the operation of the rule, it must be in the order and disposition of the bankrupt "with the consent of the true owner;" and where the true owner has no knowledge, nor any means of knowing, of the bankrupt's interest, "consent" on his part cannot be predicated.

Therefore, where a bankrupt, upon the occasion of a previous insolvency, suppressed the circumstance of his being entitled to a reversionary interest, and excluded it from his schedule, and it did not appear that the assignee in insolvency had any knowledge or notice of that circumstance, the latter was held entitled, notwithstanding his title had not been perfected by notice to the trustee; the Court being of opinion, under the circumstances, that there were no laches on his part.

But, *semble*, laches on his part would have been equivalent to "consent" within the meaning of the rule.

(a) Page 300, where the first paragraph of the marginal note should now be cancelled.

Mr. *Cracknall* mentioned to his Honour, that, since the date of the former order, the Lords Justices had held, in the case of *Bartlett v. Bartlett* (a), that a bankrupt's reversionary interest in a fund not falling into possession until after his bankruptcy, is in his "order and disposition;" thereby in effect reversing the ground upon which his Honour, upon the former occasion, had decided in favour of the assignee in insolvency.

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Statement.

The VICE-CHANCELLOR took time to make inquiry respecting the decision of the Lords Justices, and eventually directed the petition to be reheard.

Upon the matter coming on to be re-heard, it appeared that the bankrupt, whether fraudulently or not, had suppressed the circumstance of his being entitled to the interest in question, and excluded it from his schedule; and it did not appear that either the assignee in insolvency or the assignee in bankruptcy had any knowledge or notice of the will until December, 1856, when the fund was paid into Court.

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Mr. *Osborne*, for the petitioner, the assignee in insolvency, contended that the order made on the former occasion would stand, though possibly upon a different ground from that upon which it was placed by his Honour. According to *Bartlett v. Bartlett*, a reversionary interest was not exempted from the rule as to order and disposition by the mere circumstance of its being reversionary, but there remained the further question whether in this case the reversionary interest was in the order and disposition of the

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(a) 5 W. R. 541. 1 S. G. 259. 127.

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Therefore, where a bankrupt, upon the occasion of a previous insolvency, suppressed the circumstance of his being entitled to a reversionary interest, and excluded it from his schedule, and it did not appear that the assignee in insolvency had any knowledge or notice of that circumstance, the latter was held entitled, notwithstanding his title had not been perfected by notice to the trustee; the Court being of opinion, under the circumstances, that there were no laches on his part.

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(a) 5 W. R. 541. 1. 3. 9. 2. 127.

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bankrupt "with the consent of the true owner," the assignee in insolvency. In *Bartlett v. Bartlett* there had clearly been such consent. Here there had not. The assignee in insolvency could not consent, for he had no knowledge of the existence of the interest in question, nor could he have had such knowledge, the bankrupt having carefully suppressed all mention of his rights. It was that fraud on the part of the bankrupt which prevented the assignee in insolvency from giving notice to the trustee of the fund, and thereby perfecting his title.

He cited *Joy v. Campbell* (a), *Butler v. Hobson* (b), and *Smith v. Topping* (c).

Mr. *Cracknall*, for the assignees in bankruptcy, contended that there had been such laches on the part of the petitioner, as, in effect, amounted to consent. As assignee in insolvency, it was his duty to ascertain of what the insolvent's property consisted: *In re Atkinson* (d). Suppose *Rawbone* had died, the property would have passed neither to the petitioner nor to the respondents, but to *Rawbone's* executors, to be applied in satisfaction of his subsequent creditors: *Tucker v. Hernaman* (e).

The VICE-CHANCELLOR referred to *Ex parte Richardson* (f).

Mr. *Cracknall*.—That case cannot now be law. The mortgagee ought to have put a stop order upon the fund. His "consent and permission" could not have been more clearly evidenced than by his omission to take that step, and neglecting every precaution which could have prevented

(a) 1 Sch. & Lef. 336.
 (b) 4 Bing. N. C. 290.
 (c) 5 B. & Ad. 674, 678.

(d) 2 D. M. G. 140.
 (e) 4 D. M. G. 396.
 (f) Buck, 480.

the bankrupt from having absolute dominion over the fund: Jarman's Conveyancing, vol. 5, p. 274.

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The VICE-CHANCELLOR.—On the particular facts, that case would now be decided differently; but does not the principle of what Sir *J. Leach* says, apply? "For the purpose of defeating the claim of a bonâ fide purchaser, it must be shewn," he says, "that such possession, order, and disposition of the bankrupt was by the consent and permission of the true owner." Can you predicate "consent and permission" where there has been no knowledge?

Mr. *Cracknall*.—But here there have been such laches as are tantamount to consent.

Mr. *Waller* appeared for the personal representative of *Cecilia Mary*, the deceased daughter of the testator.

Mr. *Osborne* replied.

The VICE-CHANCELLOR reserved judgment, observing that the decision would depend upon a perfectly novel question, viz. how far an assignee in insolvency, or any general assignee, was bound to ascertain of what the property of the insolvent, or assignor, consisted.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

July 15th.
Judgment.

In this case the facts are these: The petitioner is the assignee in insolvency of *John Edward Rawbone*, who became entitled, in 1828, to a reversionary interest in a fund, subject to a life interest, which did not expire until 1856. In the meantime, in the year 1841, he became

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insolvent, and, by an order of the Court for the Relief of Insolvent Debtors, his whole property was vested in the petitioner, as assignee in insolvency. In August, 1854, he became bankrupt. In January, 1856, the party entitled to the life interest in the fund died, and in December, 1856, the petitioner received notice of the payment of the fund into court.

Up to the time when the fund was paid into court it does not appear that either the assignee in insolvency or the assignee in bankruptcy, the adverse claimant, had any knowledge or notice of the interest of the insolvent in the fund. The insolvent, whether fraudulently or not, had excluded it from his schedule; and so little ground had either of the assignees for suspecting the existence of any such interest, that, since the vesting order of 1841, the trustee, who has now paid the fund into court, actually made a payment of a small sum of money to the insolvent himself on account of his share and interest under the will. It is clear, therefore, that I must assume that neither of the assignees had any knowledge or notice of the insolvent's interest.

The question that was raised when the case first came before me was twofold: First, whether, in August, 1854, when the insolvent became bankrupt, the fund was "in his order and disposition;" and if so, then, secondly, whether it was in his order and disposition "with the consent" of the assignee in insolvency, who was "the true owner."

Upon that occasion I came to a conclusion, which, from the subsequent decision of the Lords Justices in *Bartlett v. Bartlett*, I have no doubt was erroneous, that the bankrupt's interest in the fund being reversionary at the time of his bankruptcy, and not falling into possession until after

that event, was not in his order and disposition. None of the cases then cited shewed that it was, nor could I find any authority which had gone that length; under those circumstances, I did not feel called upon to be the first to extend the rule, and accordingly I decided in favour of the assignee in insolvency.

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Subsequently, however, to that order, and before the order was drawn up, the Lords Justices held, in the case of *Bartlett v. Bartlett*, that a bankrupt's reversionary interest in a fund not falling into possession until after his bankruptcy, is in his order and disposition. In consequence of that decision, I thought it right to allow this petition to be reheard; which has now been done, and the result is, that I am satisfied that my former decision upon the first point was erroneous, and that the bankrupt's interest, although reversionary, was in his order and disposition at the date of his bankruptcy.

But now arises the second question, viz. whether it was in the order and disposition of the bankrupt "with the consent" of the assignee in insolvency, who was then "the true owner."

As regards this question, the case appears to be entirely new, except so far as *Ex parte Richardson* (a) may have a bearing upon it. The observations of Lord *Hardwicke* in *West v. Skip* (b), and those of the learned Judges in *Smith v. Topping* (c), shew that the words "with the consent of the true owner" are not merely formal words. In *Smith v. Topping*, the true owner permitted his goods to remain in the order and disposition of the bankrupt until the day before he became bankrupt, and then demanded the possession of them. The bankrupt refused. And it was held, that, inas-

(a) Buck, 480.

(b) 1 Ves. sen. 243.

(c) 5 B. & Ad. 674, 678.

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much as "he had not the possession of the goods at the time when he became bankrupt *with the consent of the true owner*," the latter was entitled to recover. Which shews that the absence of such consent is decisive.

There are other cases which have proceeded upon the principle that the consent of the true owner is essential to the application of the rule as to order and disposition. Thus, in *Ex parte Smyth*(a), where a lady purchased an annuity, and took an equitable assignment of it from the party, who afterwards became bankrupt; the bankrupt was her solicitor, but did not inform her that he was himself the vendor. However, he was her solicitor, and was trusted by her to do all that was proper for perfecting the purchase and assignment. Relying upon this, the lady omitted to give notice of the assignment to the trustees; and it was held, that, as she had employed the bankrupt as her solicitor to do whatever was needful to the completion of the assignment, she could not be considered as having consented to the annuity remaining in the bankrupt's order and disposition.

That seems not to have been approved of by the Lords Justices in the recent case of *Ex parte Boulton, Re Sketchley*(b), therefore I cannot act upon it; because, although their Lordships do not appear to have doubted the principle there adverted to, as to consent being essential, they do appear to have doubted the application of that principle to the particular facts of the case.

The case of *Ex parte Richardson*(c) proceeds upon the same principle, and has also a material bearing upon the further question, how far consent can be predicated where the true owner had no knowledge that the property was in

(a) 3 M. D. & De G. 687. (b) 5 W. R. 445. (c) Buck, 480.
J. D. G. 163.

the order and disposition of the bankrupt? That case, it is true, is one which would not now be law upon the facts before Sir *John Leach*, owing to the circumstance of the mortgagee—the true owner—having omitted to put a stop order upon the fund, which omission would now be held such laches as to amount to “consent.” But there, what had happened was this:—a share of a surplus of stock standing in the name of the Accountant-General was mortgaged to secure a debt. The Accountant-General transferred the share into the name of the mortgagor, who afterwards became bankrupt. The mortgagee knew nothing of the transfer, and Sir *John Leach* held, that, knowing nothing of the transfer, he could not be said to have consented, and that he was, therefore, entitled to the fund.

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The only other case I have been able to find having any bearing upon the question how far consent can be predicated of a party who at the time is in entire ignorance of the existence of his right, is that of *Load v. Green*(a). There, a person bought goods of the Plaintiff with the fraudulent intention of never paying for them, and, within a few days after the delivery of the goods, he committed an act of bankruptcy; and it was decided that the goods did not pass to his assignees by virtue of the rule as to order and disposition. The ground upon which that decision was ultimately come to, appears to have been, that at the time of the act of bankruptcy, upon which the title of the assignees depended, the bankrupt was not “apparent owner” but “real owner,” so that the statute did not apply(b). But during the hearing, and in the course of the judgment, observations were made by the learned Judges, which have a considerable bearing upon the question I am now considering. It was argued that there could be no *consent* and *permission* to the bankrupt being the reputed owner, for *consent* must

(a) 15 M. & W. 216.

(b) Id. 223.

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mean consent with knowledge of all the circumstances—knowledge that the party consenting was the real owner, which could not apply to a case where the transaction was fraudulent altogether on the part of the buyer. Upon which, Mr. Baron *Platt* said this: "It is a penalty upon the consenting party." And Mr. Baron *Alderson*—"How can a man *permit* who does not know that he has a *right* to refuse?" That has a considerable bearing on this case. "He supposes he has parted with the property in the goods: if he has, he has no right to refuse the possession; therefore, the supposed consent is under circumstances, in which, if they were true, he had no right to refuse"(a). Then *Parke B.*, in delivering the judgment of the Court, refers to Lord *Redesdale's* observations in *Joy v. Campbell*(b),—observations which are so material that I should have cited them independently, if it had not been more convenient to read them from this citation. He says, "The meaning of the statute is well explained by Lord *Redesdale* in *Joy v. Campbell*, in construing the analogous Irish Act. His Lordship says, that 'it refers to chattels when the possession, order, and disposition, is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits, *unconscientiously*'"(c) (the word is printed in italics in the report) "'as the Act supposes, to have such order and disposition.' 'The object was to prevent deceit by a trader from the visible possession of property to which he was not entitled; but in the construction of the Act, the nature of his possession has always been considered, and the words have been construed to mean—possession of the goods of another with the consent of the true owner.'"

Here, if laches could have been predicated of the conduct of the assignee in insolvency, I should have followed *Bart-*

(a) 15 M. & W. 217. (b) 1 Sch. & Lef. 336. (c) 15 M. & W. 222.

lett v. Bartlett, and the current of authorities which have decided that laches are equivalent to "consent" within the meaning of the Act.

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I observe that Lord Justice *Turner*, in his judgment in *Bartlett v. Bartlett*, refers to that part of Lord *Hardwicke's* judgment in *West v. Skip(a)*, where he says, "There has been no case upon this Act, or ever will be, wherein a Court of law or equity will do so severe a thing as to subject the property of one to the debts of another, without proof of the consent of the real owner to leave them in the power of the bankrupt (possession only not being sufficient), or a laches in letting them remain there, so as to gain him a false credit." And then Lord Justice *Turner* adds, "There, it will be seen that Lord *Hardwicke* referred particularly to laches."

I could have no doubt that laches on the part of the insolvent assignee would have amounted to "consent" within the meaning of the Act. And this applies to *Troughton v. Giley(b)*, and all that class of cases. In *Troughton v. Giley*, the bankrupt went on trading for four years after his bankruptcy, without interruption from the assignees; and there it was held, that they must be postponed to the subsequent creditors, it being their duty to look after their debtor and see what he was doing, and what debts they were allowing him to incur.

Here, if it could be said that there was any duty incumbent on the assignee in insolvency, which he failed to discharge, I should have held that his failure to discharge it amounted to consent. But the insolvent has chosen to exclude from his schedule the circumstance of his being entitled to this reversionary interest,—has effectually concealed that

(a) 1 Ves. sen. 243.

(b) Amb. 630.

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circumstance, and I cannot conceive of any means by which his assignee in insolvency could possibly have discovered it. He neither knew, nor had he any means of knowing, of its existence. And it is impossible to charge him either with consent or laches.

The result is, that the order I made on the former hearing will stand, though upon different grounds from those upon which I decided the case.

June 8th &
9th.

IN THE MATTER OF THE TRUSTEE RELIEF ACT;

AND

IN THE MATTER OF THE TRUSTS OF THE WILL
OF JAMES ARMSTRONG, DECEASED.

Stock—Rever-
sionary In-
terest—Assign-
ment—Bonus.

An assign-
ment of
2000*l.* South
Sea Stock,
part of a sum
of 12,200*l.*
like stock, to
which the as-
signor was
entitled in re-
version upon
the death of
his mother,
and all his
right, title,
and interest
therein:
— *Held*, to
pass all
bonuses which
accrued during
his mother's life subsequently to the assignment.

THERE were two petitions in this case, on the part of two different classes of persons claiming to be interested in a fund of South Sea Stock, which was settled by the will of *James Armstrong*; and the question was, whether bonuses which had accrued upon the South Sea Stock, had passed by assignments which had been made of certain shares and portions of the stock under the following circumstances:—

James Armstrong, by his will, bequeathed 1200*l.* South Sea Stock, upon trust for *Dorothy Jane Nutt*, for life, and after her decease for her children. She had only one child, whose name was *James Armstrong Nutt*, and he therefore became entitled to this stock, subject to his mother's life interest; and during her life he made several assignments of portions of it.

Plunkett v. Mansfield, 2 J. & Lat. 344, not followed.

The first was by an indenture dated the 9th of March, 1838, and made between *James Armstrong Nutt* of the one part, and the Petitioners, *Smedley* and others, of the other part; and thereby, for a money consideration, *Nutt* sold and assigned to *Smedley* and the other parties to the deed, all that sum of 2000*l.* South Sea Stock, and the dividends thereof, from the decease of *Dorothy Jane Nutt*, part of the said sum of 12,200*l.* like stock, then standing in the names of *William Jennings*, *Richard William Jennings*, *George Barne Trollope*, and *Dorothy Jane Nutt*, upon the aforesaid trusts, together with all his right, title, and interest in the said stock and dividends thereof.

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He made similar assignments of other sums, and then, in 1844, he assigned the remainder of the stock to purchasers of other parts, upon trust to apply the same, so far as the same would extend, in the payment and satisfaction of the legacy duty (if any were payable); and also in the payment and satisfaction of all the costs, charges, and expenses which might otherwise be chargeable, or charged upon, or payable out of the parts or shares of and in the said sum of 12,200*l.*, South Sea Stock, before purchased by them, or of any such parts or shares, and to pay the residue, if any, to himself.

On the 7th day of July, 1845, the sum of 732*l.* stock was added by the South Sea Company, as a bonus on the said sum of 12,200*l.* stock, making together the sum of 12,932*l.* stock.

By the South Sea Company's Winding-up Act, 1854, the court of directors of the company were directed to sell and convert into money all the property of the company, and divide the surplus, after payment of debts and compensation, among the proprietors of the capital stock of the company, rateably, according to their shares; and on the 2nd day of October, 1855, the trustees received from the South

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Sea Company the sum of 14,870*l.* 16*s.*, in part payment of that proportion of the amount of assets of the said company to which they were entitled in respect of the said sum of 12,932*l.* South Sea Stock, and they invested the residue of such money, after deducting the necessary expenses and commission, in the purchase in their names of a sum of 16,763*l.* 11*s.* 6*d.*, 3*l.* per Cent. Consolidated Bank Annuities, upon the trusts by the said will declared for the benefit of the said *Dorothy Jane Nutt* and her issue, as aforesaid.

In the month of March, 1856, a further sum of 644*l.* 12*s.* was received by the trustees from the company, in further payment of the proportion of the assets to which they were entitled, and they invested the residue thereof, after deducting the commission and other necessary charges, in the purchase in their names of 702*l.* 14*s.* 3*d.*, 3*l.* per Cent. Consolidated Bank Annuities, the total amount then standing in their names as such trustees having thereby become 17,466*l.* 5*s.* 9*d.* Bank Annuities.

The said *Dorothy Jane Nutt* died on the 13th of September, 1856, without having ever had any child except *James Armstrong Nutt*. The surviving trustee transferred and paid into court, under the Trustee Relief Act, in trust in these matters, the said 17,466*l.* 5*s.* 9*d.* Bank Annuities, and the sum of 193*l.* 1*s.* 8*d.* cash, being dividends thereof.

—
Argument.

Mr. *Giffard*, Mr. *G. L. Russell*, Mr. *Cary*, Mr. *Southgate*, Mr. *Bedwell*, Mr. *Hoffman*, and Mr. *Drewry* appeared for the several parties; and considerable discussion took place upon the decision in *Plunkett v. Mansfield* (a), which, if applicable to this case, seemed to determine that the bonuses did not pass by the assignments to the Petitioners.

(a) 2 J. & L. 344.

Wright v. Wright (a), and *Lucas v. Bond* (b) were also cited. The arguments are fully noticed in the judgment.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

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[His Honour stated the will and the assignment to *Smedley*, and continued:] This was an assignment of a definite sum of 2000*l.*, part of the sum of 12,200*l.* stock, which was standing in the names of the trustees.

Now, what is the effect of such an assignment? I apprehend that its effect was, immediately upon notice being given to the trustees, to make those trustees, who were trustees before for *James Armstrong Nutt*, trustees thenceforth for the assigns of this particular sum of stock, being a portion of the sum of 12,200*l.* South Sea Stock.

As to the other assignments, which were subsequently made, although in a somewhat different form, I do not think, in substance, that any sound distinction can be made between them on that ground.

The only difference which is of any importance to notice, because it was conceived that difference might obviate the effect of the decision in the case of *Plunkett v. Mansfield* (c), to which I must presently refer, was that, at last, after all the other twelfth shares had been sold, a portion of the twelfth share which was remaining was assigned to the purchasers of other parts, upon a special trust to pay legacy duty, if any, and the costs and charges which might be incurred in making good their security. I do not think anything material will turn upon that, because, if the distinction which is drawn by Lord *St. Leonards* in the case of *Plunkett v. Mansfield* (c), between an assignment of a portion

(a) 1 Ves. sen. 409. (b) 2 Keen, 136, 496. (c) 2 J. & L. 344.

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and an assignment of the whole fund out and out can be maintained, that distinction would not be met by an assignment of the last part, which was intended merely by way of security, leaving, therefore, some interest in the nature of an equity of redemption, subject to the charge of the assignor. In truth, it seems to me that the two cases are precisely the same. I must deal with them both as if they were assignments of certain definite portions of this stock—whether it is called 2000*l.*, part of the stock in the one case, or a sixth part of the stock, amounting to 2000*l.*, in the other case—it seems to me, in both cases, to be an assignment of so much of a particular fund or sum. Upon principle, it seems to follow, when a person is made a trustee of a fund for another, that, having become trustee of that fund, he is trustee also of all the benefits to be derived from that fund for the person for whom he so became trustee, and that the cestui que trust is owner of the share, and entitled to all the benefits arising from that share. No one would suppose, *primâ facie*, that such an assignment was a contract to transfer the sum of 2000*l.*, at the expiration of the life interest, because, if so, then, in case the trustees committed a breach of trust and wasted the whole fund, of course the assignor would be compelled still to make good the 2000*l.*, when the period arrived for its being paid over. After the execution of a deed purporting to be an effectual assignment of the fund in the hands of the trustees, the assign giving them notice that thenceforth they are trustees for him instead of the original owner, it is impossible to contend, if the trustees subsequently commit a breach of trust, that there still remains a contract, at the death of the tenant for life, that the assignor is to supply the fund out of his own money; but if not, it would seem that all the incidents of ownership should follow for the benefit of those whose property the assigned share is, and that the trustees holding that property upon trust for the assign, would hold also any benefit that might be derived from the character

of the property for the same assign. However, the case of *Plunkett v. Mansfield* (a), unquestionably, if correctly reported, is an authority for a contrary view; and I cannot distinguish it from this case. When I say correctly reported, there is one circumstance in which it is obviously incorrect; because, if the deed which is there stated to have been dated in 1834 was really of that date, as the bonus was declared in 1821, the question could not have arisen, and this in some degree throws discredit upon the whole report. But, although my confidence is thus somewhat shaken as to the exact grounds of the decision, yet I can scarcely doubt, that a decision to this effect upon some grounds was arrived at by Lord *St. Leonards*. The case was very singular in its circumstances. A lady was entitled to an interest for life in part of the income of a sum of 7500*l.* Irish Bank Stock, with remainder as to all the capital to her children. Other questions arose in the case, which have nothing to do with the point I am now considering, with regard to the surplus dividends which were not required for the mother. But the effect was, that the fund could not be disposed of, or dealt with, or transferred to anybody by the trustees during the life of the mother. One daughter, being so entitled, in 1813 executed a settlement, which recited that she would be entitled to a fifth part of the sum of 7500*l.* Bank Stock, and that she had agreed that when she should be entitled to receive it, such share should be transferred to trustees upon the trusts of the settlement, and in consideration of the transfer of other Bank Stock, to which the intended wife was absolutely entitled, and of the one-fifth, "being the entire portion of *Frances M'Dermott*," the intended husband secured to her a jointure. Then, in the declaration of trust, the one-fifth of the said sum of 7500*l.* to which she would become entitled on the death of her mother was referred to, as being then

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(a) 2 J. & L. 344.

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vested in the names of the trustees, for the uses mentioned in the indenture for the mother. And a question arose upon that portion, whether or not, a bonus having been declared in 1821, a share of such bonus belonged to the trustees of the settlement; and upon that part of the case the Lord Chancellor declared that the trustees were entitled to the bonus; for he says, "*Mrs. Blake* made the settlement in question, and by it settled all her property in possession, and also assigned her one-fifth of this particular sum of Bank Stock, but said nothing of any accretion which might be made to the capital sum. * * * The question then is, what construction am I to give to this settlement? I think that she meant to settle all her Bank Stock, and that there are sufficient words in the settlement for that purpose. The capital of the Bank Stock invested to answer the annuity represents by intention, and by operation of law, not only all accretions made to it by bonus, but also all the surplus dividends and savings arising from that very stock. If the stock itself were settled subject to the annuity, and no exception made out of it, the settlement must have passed everything arising from the fund." Now, I have the satisfaction of finding that Lord *St. Leonards* took exactly the view which I have taken of this transaction—he says, that the stock producing accretions is settled subject to the annuity.

Lord *St. Leonards* continued:—"I consider, therefore, that the settlement of the one-fifth of the 7500*l.* Bank Stock, being the fountain from which everything flowed, includes in it all the accretions thereto." So far I have the satisfaction of finding that the view of Lord *St. Leonards* entirely agrees with that which seems to me to be the obvious effect of the assignment now before me. But it appears that there was another transaction by a deed, said to be dated in 1834, but which I conceive must have been dated some time anterior to 1821, by which, after reciting

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that this Bank Stock was vested in the names of trustees, and that *Thomas M'Dermott* was entitled, after the death of the mother, "to one-fifth share of the said sum of 7500*l.*, and that he had contracted with *Frances M'Kenna*, his mother, for the absolute sale of 750*l.*, being one-half of the said sum of 1500*l.* Bank Stock as aforesaid, for the sum of 500*l.*" he assigns the 750*l.*, or one-half the sum of 1500*l.*, Bank Stock, and all his interest therein, reversionary or otherwise, to *Frances M'Kenna*, and every part thereof, to hold to all intents and purposes as he might enjoy the same; and by another assignment, he assigned to another person the other moiety of the 1500*l.* Bank Stock. That appears to me, just as in the case before me, to be an entire parting with his interest, with the intention of passing his equitable interest, vested in trustees for him, to the assigns, for whom the trustees, immediately upon receiving notice, would hold the fund so assigned. However, that point was brought before the Lord Chancellor on a subsequent day. The first remark I have to make upon the case is, that it appears to have been brought on in some irregular way. There is no argument given, except that it is stated:—"Mr. *Hartley* and Mr. *J. O'Callaghan* for the children of *Thomas M'Dermott*, who under the will of *Frances M'Kenna* were entitled to one-half of the one-fifth assigned to her by *Thomas M'Dermott*, and claimed a proportionate share of the accretions and accumulations," and this seems to have taken place at the end of the argument of the main case. I see the Lord Chancellor begins his observations thus—"This question ought not to have come before me in the way that it has;" indicating that it had not been brought before him in a regular or a very satisfactory way. "If the parties desire it, they may file a bill to ascertain whether the purchaser is entitled to what she claims." The claimants, it seems, declined to file a bill; and then he says: "My opinion is, that the purchaser is not entitled to what she claims. The case is quite distinguish-

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able from the former ones. My opinion in them was founded on this, that, considering the question of intention with reference to the instrument, the intention was to settle all that to which the parties were entitled. I think that those cases admit of no other sound construction. But this is a case of a very different nature, for here there is a specific contract, not for the whole, but for a particular portion of the fund, described as 750*l.* Bank Stock, and it is measured, not by a consideration like marriage, which of itself is sufficient to convey any amount of property, but there is a specific price paid for a specific article; and I must consider the price as measured by that which on the face of the instrument is stated to be assigned. If a bill were filed, and the parties were to shew what the real contract was, perhaps I should be of a different opinion." This evidently shews that the case did not come on, as he says, in a very satisfactory way. The Lord Chancellor of *Ireland* was not satisfied that he had the whole case before him; and he seems to have had some notion, from their refusing to file a bill, that there was something behind, which shewed that they were endeavouring to get an advantage, or to secure some of the accretions to which he conceived there was not evidence enough upon the face of the deed to shew they were entitled. Then he says:—"The subsequent general words are ambiguous, and may be used either way. A man who buys must tell distinctly what it is he has purchased; therefore, as the consideration for this purchase is measured by value and not by marriage, which covers any amount, and in which you may look at the general terms of the deed, I cannot hold that the purchaser was purchasing, not only the 750*l.* Stock, but also the different accretions which should be produced by it."

The judgment up to this point must have had a more immediate bearing upon the surplus dividends which remained after the mother had been paid her annuity; and I see no

reason at all why they should have been considered to have passed by the deed, because all that the son assigned was the particular fund, and not the dividends which had accrued thereon, unless it be the dividends which accrued after the assignment, which would be open to exactly the same observation. Lord *St. Leonards* then continued: "There is some difficulty as to the bonus; for I should hold, that, if a man sold Bank Stock, and that afterwards and before the transfer a bonus was given upon that stock, the seller could not claim it, for it is given to the person who is the owner of the Bank Stock at the time: it follows the ownership. But this is a case of a sale of a particular sum of stock out of a reversionary interest in Bank Stock, and the purchaser was not entitled to call for a transfer at the time when the bonus was declared." That does not seem to me to meet in any way the observation that the stock was his, waiting for its transfer until the life interest had expired. I think the real test is this. It was suggested in argument, that it was like the case of a trading transaction, the trade might fail and be entirely destroyed, and who was to bear the loss. I think the simplest way of viewing it is this: the whole question is, whether the contract in this case was a contract to transfer the stock at *Mrs. Nutt's* death, or whether it was an actual parting with the interest. In whom was the property after the assignment? In the event of a *devastavit* by the trustees, can any one suppose that the vendor would be liable on this deed for a *devastavit*, and would be bound, on the death of *Mrs. Nutt*, to transfer so much Bank Stock. The moment it was assigned, the whole ownership was in the assign, instead of being in the assignor; and so far from its being at all analogous to the case suggested in argument, of a contract to transfer at a given date, it seems to me to be exactly the opposite case, and an immediate transfer of all the interest and estate for the benefit of the persons to whom the assignment was made; and as to the question of consideration, I cannot

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follow the observations of Lord *St. Leonards*, because, whatever be the article I buy in reversion, if I pay for it immediately, it becomes mine, subject to the anterior life interest; of course, the money value I have paid must be taken to be the measure of the thing I have bought. I cannot in the least see how the difference between a marriage consideration and a money consideration can have any bearing upon it, unless the bill had been to set aside the transaction of a purchase of a reversionary interest, upon which it would be very proper to ascertain whether a sufficient value had been given; but when I have to consider whether a certain thing is parted with, it does not seem to me to assist the case in the least to speculate on what was the amount of the consideration. I cannot help thinking that a doubt on the validity of the purchase must have been floating in the mind of the Lord Chancellor, by the fact of his saying, if a bill were filed I should know the whole transaction. There must have been in his mind a notion that a very inadequate sum had been given for this Bank Stock, considering its value and the possibility of accretions.

Therefore, I come to the conclusion on the whole, that the purchaser was only buying this amount of money, whatever it might be. I confess, the case being supported by such an authority as a decision of Lord *St. Leonards*, appeared to me to require great consideration; but of course, he sitting in Ireland, and not here, I am not bound by it. I am unable, I say it of course with great deference, the fault may be with myself, but I am entirely unable to appreciate the foundation for the judgment; and it seems to me, from the moment this gentleman parted with his stock, the gentleman to whom it was assigned became cestui que trust of it, and became entitled to everything that was vested in the trustees, and therefore entitled to all subsequent accretions.

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IN RE SANDERSON'S TRUST.

July 4th.

WILLIAM SANDERSON, by his will in 1836, devised and bequeathed all his real and personal estates whatsoever to trustees, upon trust, (after payment of his debts, testamentary and funeral expenses) yearly and every year during the life of his brother *John Sanderson*, since deceased, to pay and apply *the whole or any part of the rents, issues, and profits* of his real and personal estate and effects *for and towards his maintenance, attendance, and comfort*; and give him the use of his household goods and furniture; and after his decease to sell and dispose of his said real and personal estate and effects. And the testator declared his will to be, that the monies which should arise from such sale should be deemed to be part of his personal estate, and that the clear yearly rents and profits of his said hereditaments and premises, in the meantime and until the same

Will—Construction—Maintenance—Gift of "the whole or any part"—Trustees—Discretion.

Devise and bequest of real and personal estate to trustees, upon trust, yearly and every year during the life of J. S. (who was imbecile and not competent to manage his own affairs), to pay and apply *the whole or any part of the*

rents, issues, and profits *for and towards his maintenance, attendance, and comfort*.

Seemle a trust which this Court would have enforced during the life of J. S., upon a case made that a sufficient part of the rents, issues, and profits was not applied for his maintenance, attendance, and comfort; and the trustees could not have insisted on their discretionary power as ousting the jurisdiction of the Court. But it would not have conferred on J. S. an absolute right to have the whole income so applied, except in the event of a case being made that the whole was wanted for the specific purposes directed by the will.

Seemle, also, that the trust was in exoneration of the private property of J. S.; and had that property been to any extent applied towards his maintenance, attendance, and comfort, his personal representatives would have been entitled to have it recouped to that extent out of the income of the trust property.

But, it appearing that no part of his private property had been so applied, and that all that was necessary for his maintenance, attendance, and comfort, up to his death, had been supplied out of the income of the trust property,—*Held*, that the trust for his benefit was discharged, and that the surplus income of the personal property passed to the residuary legatees, and the surplus rents of the real estate (there being no devise of the surplus rents accruing during the life of J. S.) to the testator's heir at law.

Distinction between a gift, like the above, of "*the whole or any part*," and a gift of an entire fund, or the entire interest of a fund, for a particular purpose assigned: in the latter, although the purpose fails, the Court holds the donee entitled to the entire fund or interest (as the case may be), treating the purpose merely as the motive of the gift.

Distinction also between such a gift and that in *Cope v. Wilmot*, 1 Coll. 396, where the object was so large as, under the circumstances, to entitle the donee to the whole.

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should be sold, or of so much thereof as should be remaining unsold, should be deemed to be part of the annual income of his personal estate, and should be subject to the disposition thereafter made concerning his personal estate. And as touching his personal estate remaining after payment of his debts, funeral and testamentary charges, and legacies thereafter bequeathed, he directed his trustees to divide his personal estate into two portions, and to pay the same as therein directed.

The testator died in February, 1836. His brother, *John Sanderson*, who was also his heir-at-law, died in 1856, intestate.

The trustees stated, by their affidavit, that the rents of the real estate and part of the dividends and income of the personal estate were applied, during the lifetime of *John Sanderson*, for and towards his maintenance, attendance, and comfort; and that they were advised that it was doubtful whether the savings and accumulations of the income of the testator's personal estate, which were made in the lifetime of his brother *John Sanderson*, belonged to the administrator of *John*, or formed part of the testator's residuary personal estate; under these circumstances, they paid the entire residuary estate, including the savings and accumulations, into court.

The parties entitled to a moiety of the property forming the subject of the residuary bequest now presented a petition for payment to them of a moiety of the entire fund so paid into Court.

It appeared that the testator's brother, *John Sanderson*, was not altogether in a sound state of mind, and was not competent to direct his own affairs. Also, that, although he *John Sanderson* had property of his own, independently of

what was given him by the will, all that was requisite for his "maintenance, attendance, and comfort" was provided by the trustees out of the income now in question, and that no part of his own property had been applied for that purpose.

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Mr. *Rolt*, Q. C., and Mr. *Wakefield*, for the petitioners:—

Argument.

Under the trusts of the will, the testator's brother was only entitled to so much of the rents and profits of the real estate and of the income of the personal estate as was sufficient, in the judgment of the trustees, for his "maintenance, attendance, and comfort." And the brother being now dead, and the trustees having adequately applied the rents and income for the purposes specified, the surplus passes to the petitioners and the other parties entitled as residuary devisees of the real estate and residuary legatees of the personal estate.

There is no gift to the brother: it is simply a power for the trustees to apply "the whole or any part,"—so much as in their judgment was requisite for the purposes specified—in other words a competency—a maintenance for his brother.

They cited *Browne v. Paull* (a) and *Surman v. Surman* (b).

The VICE-CHANCELLOR.—What do you say as to the savings of the rents and profits of the real estate which accrued during the lifetime of the brother?

Mr. *Rolt*, Q. C.—The trustees depose by their affidavit,

(a) 1 Sim. N. S. 92.

(b) 5 Madd. 123.

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that the whole of those rents and profits were applied for the maintenance, attendance, and comfort of the brother, so that it is only as to the personalty that the question arises.

Besides, there is an express direction that the rents and profits of the real estate are to be applied in the same manner as the income of the personal estate, i. e. are to be held upon the same trusts as the personal estate; and this includes rents accruing during the lifetime of the brother.

Mr. Cairns, Q. C., and Mr. Bagshawe, jun., for the personal representatives of the testator's brother, *John Sanderson*.

The trust extends to the whole yearly proceeds, as well of the real as of the personal property. All is to be applied for the brother's benefit, and his personal representatives are entitled to the whole of the savings, from whatever source derived.

The case belongs to that class of bequests where there is a gift of a fund for a particular purpose, which does not exhaust the fund, or which in fact is never carried out; where the Court treats the gift as absolute, and the purpose as merely the motive of the gift. Here, had the gift been of the whole fund, no question could have arisen; and the case of *Thompson v. Thompson* (a), and still more that of *Cope v. Wilmot*, there cited in a note (b), shew that the addition of the words "or any part" do not affect this construction.

There is no gift of the rents and profits of the real estate,

(a) 1 Coll. 381.

(b) Id. 396.

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accruing during the lifetime of the brother, to any purpose other than for his maintenance, attendance, and comfort; and that circumstance affords an additional reason for the conclusion, that the whole of such rents and profits were intended to be applied for those purposes.

At all events, it entitles the personal representative of the deceased brother, who was also heir-at-law, of the testator, claiming *ab intestato*, to so much of those rents and profits as was not applied for the purposes specified, upon the ground that the testator has omitted to dispose of them: for, upon the terms of this will, it is impossible to contend that rents accruing during the lifetime of the brother passed under the direction that "the clear yearly rents and profits of the said hereditaments and premises in the meantime and until the same should be sold, or of so much thereof as should be remaining unsold, should be deemed to be part of the annual income of the testator's personal estate;" that passage applying exclusively to the rents and profits accruing after the brother's death.

In any case, therefore, there must be an inquiry to ascertain the amount of the surplus rents; for we decline to be bound by the affidavit of the trustees, that they did not resort to the income of the personal estate until the rents and profits of the real estate were exhausted. They had, in fact, no discretion to adopt such a course.

They cited, also, *Alexander v. McCulloch* (a).

Mr. *Shebbeare* for the trustees.

Mr. *Rolt*, Q. C., in reply, did not dispute that the whole of the income, as well of the real as of the personal property,

(a) 1 Cox, 391.

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was if necessary to be applied for the maintenance, attendance, and comfort of the brother, to the exoneration of his private property, the fact being, that the whole had been so applied. But to give more than was necessary would defeat the very object the testator had in view in vesting this power in the trustees.

The Court reserved judgment.

July 8th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD, after stating the will as above, proceeded as follows :—

The question that arises is, what is the interest of the testator's brother in the rents and profits of the real estate and the income of the personal estate under the trusts contained in the will ?

It is contended, on the one hand, that the brother is only entitled to so much of the rents and profits of the real estate, and of the income of the personal estate, as would be, in the judgment of the trustees, sufficient for his " maintenance, attendance, and comfort;" and that, inasmuch as he is now dead, and the trustees have adequately applied the rents and income for those purposes, the surplus passes to the residuary devisees of the real estate and the residuary legatees of the personal estate.

On the other hand, it is asserted that the bequest must be read as, in effect, a bequest entirely for the benefit of the brother; that the brother being, as it is admitted, not altogether in a sound state of mind, and not competent to direct his own affairs, the testator left his property in the hands of the trustees to apply the income for his brother's

benefit; that there is, in effect, a trust extending to the whole yearly proceeds as well of the real as of the personal property for the brother's benefit; and that those who represent the brother are now entitled to the whole of the savings arising from what was his estate.

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—
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In reference to gifts of this description, there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be.

Thus, where there is the gift of a sum to apprentice a child, or to buy a commission for a son, the Court gives effect to the entire gift; and whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the Court holds that the child is entitled to the whole of it.

So again, with regard to maintenance, as to which the distinction between the two classes of cases is very clearly put by Sir *William Grant* in *Hanson v. Graham* (a), where he says, that if an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while, on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified.

(a) 6 Ves. 249.

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In *Hanson v. Graham*, the testator gave to three of his grandchildren by name, 500*l.* a piece of Bank Annuities, when they should respectively attain twenty-one or marry, and he declared his will to be, that the interest of the said several sums of 500*l.*, as often as the same should become due and payable, should be laid out at the discretion of his trustees, in such manner as they or the survivor of them should think proper, for the benefit of his said grandchildren till they should attain their respective ages of twenty-one years or marry. And what Sir *William Grant* says in reference to that is: "It is contended that the Plaintiffs" (meaning the grandchildren) "are entitled, because interest is given, and that they come within an established rule of the Court, that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory and denoting that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest, upon this principle, that nothing more than a maintenance can be called for,—what can be shown to be necessary for maintenance,—however large the interest may be; and therefore, what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. But by this will it is clear the whole interest is given" (a).

In that case, therefore, he held that the interest was given, to be applied in that specific and definite way and in no other, and that the whole interest being given for the purpose of maintenance, the property vested, following in this, as it would seem, a rule adopted as early as the

(a) 6 Ves. 249.

case of *Barlow v. Grant* (a), where, there being 30*l.* given to an infant to bind him an apprentice, and the infant dying before he attained a competent age to be placed out an apprentice, it was held that it ought to go to the executor or administrator of the infant; and the infant having made a will and named an executor, it was held a good disposition of the 30*l.* The same rule was afterwards applied by Sir *William Grant* in *Leake v. Robinson* (b), and upon the same grounds.

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The case that seemed to militate most against this rule was that of *Cope v. Wilmot*, cited in a note to *Thompson v. Thompson* (c), a case certainly of rather a strong character, but one which does not really militate, as it appears to me, against the rule to which I have adverted. There, the testator, Sir *John Cope*, devised to trustees (whom he also appointed his executors), and their heirs, all his freehold estates, to the use of the Plaintiff for life, with remainders for the benefit of the issue of the Plaintiff in strict settlement. And he directed that his trustees, or the survivors or survivor of them, their or his executors, should and might, out of the rents and profits of the lands thereafter directed to be purchased with the residue of his personal estate, or out of the residue of his personal estate in case the same should not be laid out in the purchase of lands, raise, advance, and pay "any sums of money they should think proper and convenient, not exceeding, in the whole, the sum of 3000*l.* for the advancement of the Plaintiff in any business, art, or profession, or in any civil or military appointment." The will then contained a direction for the investment, as soon as conveniently might be, of the residue of the testator's personal property in the purchase of lands, to be settled to the like uses as the first-mentioned real estates. After the testator's death, the trustees laid out the sum of

(a) 1 Vern. 255.

(b) 2 Mer. 363.

(c) 1 Coll. 399*d*

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1000*l.*, part of the testator's personal estate, in purchasing for the Plaintiff, who was then an infant, a commission in the army, and they also expended the further sum of 93*l.* 2*s.* 6*d.* in purchasing for him a horse, and arms and accoutrements, but they declined to advance any further part of the 3000*l.* After he had attained his majority, the Plaintiff filed his bill against the trustees, claiming payment of the residue of the 3000*l.* The Defendants, by their answer, admitted assets sufficient to pay the residue of the 3000*l.*, and also admitted that they had, on certain grounds stated in their answer, declined to do so; and submitted whether they were bound to do so. The Court declared that the Plaintiff was entitled to the further sum of 1906*l.* 17*s.* 6*d.* residue of the testator's personal estate, for his own use and benefit; and directions were given for payment of that sum to the Plaintiff.

That decision seems, after all, to have proceeded upon the same ground. The purpose there was large. The gift was "for the advancement of the Plaintiff in any business, art, or profession, or any civil or military appointment." The Court seems, it is true, to have acted very strongly with reference to the discretion vested in the trustees; yet the decision was not inconsistent with what I conceive to be the rule, namely, that when an indefinite amount is given to any person he has a right to draw, out of the fund appropriated indefinitely for a particular purpose, as much as may be necessary for the given purpose. The Plaintiff having come of age, it was not inconsistent for the Court to say, in reference to that large and indefinite right on his part to advancement, that he was entitled to draw out the whole of the fund for the purpose of advancing himself in life,—the purpose being so large there was sufficient to exhaust the whole amount. That must have been the principle upon which *Cope v. Wilmot* was decided: otherwise it would

be difficult to reconcile the decision with some other cases. But there the purpose was sufficiently large. And it appears to me, that, had the Plaintiff died under age, it would have been impossible under that will to contend, that when the commission in the army had been bought, and no other purpose pointed out, his personal representatives would have been entitled to apply to the Court to have the balance paid over to them as representing his interest.

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In the present case, the trust is plainly very different. It is a trust to apply "the whole *or any part*" for the purposes specified, namely, for the maintenance, attendance, and comfort of the testator's brother. And with regard to the absence of any words indicating that this application is to be at the discretion of the trustees, I apprehend, that, in one sense, there is no discretion in the trustees. The trustees have not the discretion of saying "we will withhold any part of this income merely upon our representation of what we think discreet." If a bill had been filed on behalf of this gentleman, during his lifetime, to have a sufficient part of the income drawn out for the purposes of his maintenance, attendance, and comfort, it would not have been competent to the trustees to say, "we in our judgment, and in the exercise of our discretion, do not think that this is requisite, and the matter is one for our discretion and not for the judgment of the Court." The testator might have given them such a discretion, regard being had to the circumstance that his brother had other property; but that is not the trust he has created. The trust he has created is an absolute trust for his brother to have every thing necessary for his maintenance, attendance, and comfort. And looking to that very large word "comfort," it appears to me, that, if a bill had been filed on his behalf to have the whole fund applied according to this trust, it is extremely probable the Court would have directed it to be so applied. At the same time, I do not think it con-

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fers on him an absolute right to have the whole income applied, except in the event of a case being made, that the whole was wanted for the specific purposes directed by the will. It is not the whole income that is given. It is "the whole or any part;" and the Court would read that in the same way as "the whole or a competent part,"—the form in which many of these trusts run, where the object is the maintenance, education, and advancement of children, or the like.

I do not think, therefore, that the present case is within the class of cases where an entire fund is given and a purpose is assigned as the motive of the gift; neither do I think that *Cope v. Wilmot* is to be considered as a case which ought to govern this, so as to lead me to hold, that the whole income of the property is given out and out for the benefit of the testator's brother, or any more of that income than is necessary for the particular purposes specified in the gift.

I inquired, during the argument, whether the brother had been maintained in any way out of his own property, and for this reason :—I think he had a clear right to have this fund applied for all purposes requisite for his maintenance, attendance, and comfort. If, therefore, he had been left to his own funds for his maintenance, attendance, and comfort, I apprehend there would have been a clear right on the part of his personal representatives to have that fund recouped. Part of the personal estate of the intestate, whom they represent, having been applied for his maintenance, attendance, and comfort, when another fund ought properly to have been applied for that purpose, they would have had a right to say, recoup the fund that has been so improperly applied out of the fund which was given for that specific purpose. However, I am told that this was not the case. The brother being now dead, I must as-

sume, as there is nothing to induce me to suppose the contrary, that all that was requisite for his maintenance, attendance, and comfort, was provided for him out of the income now in question, no part of his own property being applied for that purpose. Consequently, that there has been no breach of trust or default, of which his personal representatives can complain. As regards that question, therefore, the case is reasonably clear.

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The question that remains is, as to the disposition of the savings of the rents and profits of the real estate which accrued due during the lifetime of the testator's brother. As regards the savings of the income of the personal estate, there is no difficulty. The will contains an express trust for conversion; and then, as touching his personal estate remaining after payment of his debts, funeral and testamentary charges and legacies, the testator directs his trustees to divide it into two portions, and to pay them in the particular manner he has specified. Therefore, as Sir *William Grant* says in *Hanson v. Graham*, the savings of the income of the personal estate—so much of the income of the personal estate as was not applied for the maintenance, attendance, and comfort of his brother—"must follow the fate of the principal"—must go as the capital is directed to go. But as regards the savings of the rents and profits of the real estate, it appears to me that there is not sufficient in this will to take them from the testator's heir-at-law. And this perhaps was the the strongest argument in favour of the construction contended for by Mr. *Cairns*. It was argued, that the absence of any gift of the rents and profits during the lifetime of the testator's brother to any purpose other than those specified, namely, his maintenance, attendance, and comfort, afforded an additional reason for concluding that the whole fund was intended to be applied for those specific purposes. But it does not seem to me that I can so far disregard the words "or any

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part thereof," as to hold, that this is a gift of the whole fund; or that the circumstance of the testator having forgotten to make provision for the surplus rents is sufficient to justify me in striking out of the will the words "or any part thereof," and giving a different construction from that which, but for this forgetfulness on the part of the testator, would be the proper and necessary construction of these words.

It appears to me, that the testator has forgotten to deal with the surplus rents accruing during the lifetime of his brother. He has directed his trustees, after his brother's death, to sell and dispose of his real estate, and his will is, that the moneys arising from such sale shall be deemed to be part of his personal estate; and that the clear yearly rents and profits of the hereditaments and premises in the meantime, and until the same shall be sold, or of so much thereof as shall remain unsold, shall be deemed to be part of the annual income of his personal estate, and shall be subject to the disposition thereafter made concerning his personal estate. But it would be an exceedingly forced construction of this passage to say, as it was argued on behalf of the petitioners, that I ought to hold, that the rents and profits to which the testator is there referring include the rents and profits from the time of his own death, and during the continuance of the trust for the maintenance, attendance, and comfort of his brother, so as to sweep away those surplus rents and profits into the personal estate, and pass them over, together with the personal estate itself, to the residuary legatees. Up to the period of his brother's death—that is to say, up to the period when the sale is first directed—the testator has declared an express trust of a totally different character in reference to the rents in question. Up to that period, he has appropriated those rents to the specific purpose of the maintenance, attendance, and comfort of his brother—a purpose which

might exhaust the whole; and to say, that the rents and profits which he has already devoted to a specific purpose shall now go to another purpose, namely, the purpose to which he has devoted his personal estate, would be inconsistent with the whole scope of his will; and although it was suggested as a possible construction, that the direction is equivalent to saying that the rents in question are to go "upon the trusts of my personal estate," that would but carry it back again. "The income of the personal estate being devoted to the maintenance, attendance, and comfort of my brother, apply the rents and profits upon the same trust," that trust being, in effect, the same to which the testator had already devoted such rents and profits. I think that would be a forced construction, which not even the consequence of an intestacy would justify me in adopting as a proper construction for these words.

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 — —
Judgment.

There must be an inquiry what the income of the testator's personal estate was that accrued due during the life of his brother, and what the rents and profits were that accrued during the same period; and a declaration, that the surplus funds which remain after deducting all the sums expended by the trustees in the maintenance, attendance, and comfort of the brother, ought to be divided in the ratio which the whole rents and profits bear to the whole income of the personal estate, and that so much as represents the surplus of the rents and profits on such apportionment belongs to the personal representatives of the deceased brother, and that the other part belongs to the residuary legatees.

1857.

July 27th.

BARTON v. BARTON.

Will—Construction—Absolute Devise and Bequest—Gift over in event of Intestacy—Repugnancy—Pleading—Misjoinder—Practice—Further Consideration—Dismissing Bill.

Where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant and void.

Bill dismissed for misjoinder, and because though one Plaintiff had an interest to maintain the suit the other had not, and the interest of the former was not that claimed by the bill.

After a decree merely directing accounts and inquiries, a bill may be dismissed on further consideration.

BARTON, the testator, by his will in 1849, gave and bequeathed to his sons *Joseph* and *Thomas*, and his daughter *Mary*, all his freehold estate, leasehold, and all other property, of whatsoever nature, share and share alike. And he declared his will to be, that, as to the one-third share left to his daughter, she should receive the interest only during her natural life, and that after her death her share should be divided amongst her children when they attained the age of twenty-one years; but in case she should have no child or children, or they should die under twenty-one years of age, then his will was, that the said third share should be divided between his two sons, *Joseph* and *Thomas*; but, in case his sons should either or both die intestate, that his or their share or shares should be divided between their children respectively, share and share alike; and the testator appointed his said sons and one *Gibson* executors of his will.

The testator died in 1849. His daughter *Mary* died in 1851, leaving an only child, who died an infant. His son *Thomas* died in 1852, intestate.

The bill was filed on behalf of the infant children of *Thomas*, a son and daughter, against his widow, who was also his personal representative, and against *Gibson* and *Joseph Barton*. It averred, that the Plaintiffs, as the only children of *Thomas*, became entitled upon his decease intestate to his share of the real and personal estates of the testator, including the moiety of the original share of *Mary*, which had accrued to the Defendant *Joseph* and to *Thomas* under the limitations in the will; and prayed that accounts

might be taken against all the executors accordingly, and also an account of the rents received by the Defendant *Joseph*; that the Defendant *Joseph* might be charged with an occupation rent; and that the Plaintiffs' shares in the personal estate and the rents and profits of their shares of the real estate might be secured or applied for their benefit; and for a receiver.

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By the decree made on the hearing of the cause, accounts and inquiries were directed, pursuant to the prayer of the bill, the questions which were now raised upon the construction of the will having been allowed to pass unnoticed.

The cause now came on for further consideration.

Mr. *Renshaw* for the Plaintiffs;

Argument.

Mr. *Boyle* for the widow and personal representative of *Thomas Barton*;

Mr. *C. Hall*, for the Defendants, *Joseph Barton* and *Gibson*:—

Submitted, that, whether the gift over, in the event of either of the testator's sons dying intestate, was to be read as applying to the original or to the accrued share of such son, or to both, it was repugnant and void—citing *Holmes v. Godson* (a), in which it was held by the Lords Justices, after a very full discussion of all the authorities, that where real and personal estate is devised absolutely, and there is a gift over in the event of the devisee dying intestate, the gift over is repugnant and void, and the devisee takes absolutely.

(a) 2 Jur. N. S. 383.

1857.
 BARTON
 v.
 BARTON.
 —
Argument.

The bill, therefore, was a mistake throughout. The Plaintiffs were not entitled to the interests claimed by their bill; and, having regard to their real interests under the will, there was a misjoinder, the interest of the Plaintiff, the infant son and heir-at-law of *Thomas*, being adverse, as regarded his real estate, to the claim of his sister and co-Plaintiff. If the former had an interest to maintain the suit, the latter had none; and the interest of the former was not that claimed by his bill. Having regard to the frame of the bill, the Court could make no further order in the cause.

Mr. *Renshaw*, in reply, sought to distinguish the case from that of *Holmes v. Godson*; and cited *Borton v. Borton* (a), and *Tindal, C. J., in Doe dem. Stevenson v. Glover* (b), to shew that a gift over like the present was not repugnant or void. At any rate, if the gift over were read as applying to the share accruing to *Thomas* in the event of *Mary's* death and the decease under twenty-one of her only child, there would be no such repugnancy, and *Holmes v. Godson* could not apply. There the original gift was clearly vested; here it was as clearly contingent.

But even if the Court should hold the gift over to be void, still the Plaintiff, the infant son of *Thomas*, was entitled, as heir-at-law, to the rents of his father's share, whatever that might be; and as regarded misjoinder, it was too late to take that objection after a decree made in the cause.

Judgment.
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VICE-CHANCELLOR SIR W. PAGE WOOD:—

It is unfortunate that a decree was allowed to be made in this cause, without discussion, in the face of an authority which shews, that, as to personal estate at least, a gift over

(a) 16 Sim. 552.

(b) 1 C. B. 448.

in the event of the legatee dying intestate, is repugnant and void. It has been since decided in the case of *Holmes v. Godson*, determined by the Lords Justices in March, 1856, that a like construction is to be put upon a similar devise of real estate; and that, whether the subject of the gift be real or personal property, a gift over in the event of the decease and intestacy of the party to whom an absolute interest is given by the will, is repugnant and void. But, as far as regards personal property, the point had been determined so long ago as *Lightburne v. Gill* (a), where the same was decided.

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In the case of *In re Yalden* (b), to which reference was also made in *Holmes v. Godson*, the words were somewhat different; the gift over in that case being to take effect in the event of the donee not having disposed of the property "by will or otherwise," which was in effect an absolute power of disposition.

Here the first question is, whether there is an absolute gift of the real and personal property of the testator. The testator devises his property thus:—he gives and bequeaths to his two sons and his daughters all his freehold estate, leasehold and all other property, of whatsoever nature, share and share alike. And then he declares his will to be, that as to the one-third share left to his daughter, she should receive the interest only during her life; and that, after her death, her share should be divided amongst her children, when they attain the age of twenty-one years. But in case she should have no child, or her children should die under twenty-one, then his will is, that the said third share should be divided between his two sons; but in case his sons should either or both die intestate, that his or their share or shares

(a) 3 Bro. P. C. 250.

(b) 1 D. M. & G. 53.

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Judgment.

should be divided between their children respectively, share and share alike.

The first contest was, whether, in that last clause, beginning "but in case his sons should either or both die intestate," the direction "that his or their share or shares should be divided between the children," applied, in the case of *Thomas*, to the one-third share originally given to him by the will, or to the derivative share which accrued to him on the decease of his sister and the death under twenty-one of her only child.

If it were necessary to determine the point, I should be inclined to hold, that the direction in question applied to the original and not to the derivative share of *Thomas*. But having regard to the decision in *Holmes v. Godson*, it appears to me to be immaterial to determine that point. Because, if the direction applies to the original share, then, there being an absolute gift of one-third share to *Thomas*, and a gift over of that share in the event of his dying intestate, the gift over, according to *Holmes v. Godson*, is clearly void for repugnancy; while, on the other hand, if it applies to the derivative share, then, as regards the original share, there is an absolute gift, and no gift over; and as regards the derivative share, although the gift is contingent, and not absolute like the former, still it is a gift of a transmissible interest, not, as was argued, a substitutional gift; and the gift of such an interest, followed by a gift over in the event of the decease and intestacy of the donee, is equally repugnant and void. So that, whichever way I read this clause in the will, I cannot possibly distinguish the case from that of *Holmes v. Godson*.

That being so, it follows, that neither of the Plaintiffs has any interest to maintain this suit, so far as regards the

personal estate of the testator; and the only way in which their case can be put is, that the Plaintiff, the infant son of *Thomas*, is entitled, as heir to his father, to his father's moiety of the real estate, and that in this respect he has a right to an account.

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BARTON
v.
BARTON.
Judgment.

But, having regard to the way in which this bill is framed, it appears to me, that the right thing to do is, to dismiss it without costs, without prejudice to the Defendant, the widow and personal representative of *Thomas*, or either of the Plaintiffs, filing their bill to claim their rights under the will of the testator.

That I ought not to dismiss this bill with costs is clear, after the way in which the Defendants have allowed a decree to be taken without raising the preliminary question of which I have now had to dispose.

Mr. *C. Hall* suggested a doubt whether a bill could be dismissed after decree.

The VICE-CHANCELLOR.—After a decree merely directing accounts and inquiries, a bill can always be dismissed.

1857.

IN RE STROTHER (A SOLICITOR),

AND

July 11th &
15th.

IN RE THE ACT 6 & 7 VICT. c. 73.

*Attorney and
Client—
Bill of Costs—
Taxation—6
& 7 Vict. c. 73,
s. 37—Gross
Overcharges—
Fraud—
Laches—Par-
liamentary
Business—
10 & 11 Vict.
c. 69.*

PETITION of the Pudsey Coal Gas Company, praying reference for taxation of the bill of costs of Thomas Strother, of Killinghall, in the county of York, a solicitor of the court, for business done by him as the Company's solicitor from the 15th of May, 1854, to the 25th of May, 1855, in obtaining an Act of Parliament for enlarging the powers and extending the objects of the company, amounting to 344*l.* 6*s.* 6*d.*

The Act 10 & 11 Vict. c. 69, does not deprive this Court of its jurisdiction to order taxation of a solicitor's bill of costs

for Parliamentary business. To entitle a client to an order for taxation of his solicitor's bill of costs after the expiration of twelve months from its delivery, he must shew either pressure, or gross overcharge amounting to what this Court designates as fraud. But it is not necessary to shew both.

Taxation of a solicitor's bill for parliamentary business ordered, under the 37th section of the Act 6 & 7 Vict. c. 73, upon a petition presented more than twelve months from the delivery of the bill, on the ground of gross overcharges, amounting to what this Court designates as fraud, coupled with misrepresentation by him in accounting for one of the items overcharged, notwithstanding the client knew of the circumstances, and had another legal adviser, within a month of the delivery of the bill, and might reasonably have availed himself of these circumstances to present his petition within the twelve months.

Dictum of Lord Cranworth, L. J., in *Re Barnard*, 2 D. M. G. 364, explained.

(a) By the 37th section of the Act 6 & 7 Vict. c. 73, it is provided, that no reference of any attorney's or solicitor's bill as therein mentioned, shall be directed upon any application made by the party chargeable with such bill after the expira-

tion of twelve months after such bill shall have been delivered, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made.

The bill of costs contained inter alia the following items:

1855	£	s.	d.
Jan. 24th. Journey to London, to appear before Examiner to support compliance with Standing Orders	26	5	0
Feb. 28th. Journey to London to meet Lord Redesdale to settle provisions of bill with him	26	5	0
March 6. Journey to London to attend Committee on the bill, and to prove preamble	26	5	0
„ 28. Journey to Leeds to attend meeting of directors, and from there to London, to attend the Lords' Committee, when bill passed	26	5	0

1857.
In re
STROTHER.
Statement.

The petition stated, and it was deposed by affidavit in support of the petition, and not contradicted, that, as regards the first of these items, Mr. *Strother* was necessarily absent from home four days only; and that, as regards each of the three remaining items, he was necessarily absent from home only three days.

The bill also contained a charge of twenty-five guineas, as a "sessional fee;" although it appeared that a parliamentary agent had been employed in obtaining the bill, and that no professional advice or instruction had been given^(a).

The bill also contained a charge of 30*l.* for "Drawing

(a) The "List of charges for parliamentary agents, attorneys, solicitors, and others, prepared by Mr. Speaker in pursuance of The House of Commons Costs Taxation Act, 1847," signed by the then Speaker of the House of Commons, and dated 12th March, 1852, contains the following provision:—"When a Parliamentary agent is

employed, the solicitor will not be entitled to the sessional fee, but may charge from two guineas to ten guineas, according to circumstances, in respect of his ordinary communications with such agent, with reference to the progress of the bill through its various stages, when no professional advice or instruction is given."

1857.

In re
*STROTHER.**Statement.*

certificate of new shares, and attending engraver with same, and filling up 600 certificates of new shares." Of this item an explanation was offered by the solicitor: the other items remained unexplained.

The bill having been delivered in January, 1856, it appeared that the petitioners placed the matter in the hands of Mr. *Dawson*, a solicitor, who on the 29th of February, 1856, wrote to Mr. *Strother* informing him to that effect, and that the petitioners appeared greatly dissatisfied with the charges, and wished him to get the bill taxed for them, adding, "They tell me, that they have already explained their objections to you; and as you are consequently acquainted with their views, perhaps you can suggest some term of settlement without taxation."

To this Mr. *Strother* replied by a letter dated the following day, and containing the following passage: "In making out my bill, I only made such charges as I considered fair and reasonable, and in accordance with the usual professional practice for parliamentary business; and the reason for the dissatisfaction of some of the directors I can only account for by their not being conversant with that kind of business; but, even in that case, I do not know why they should be so, as, before any proceedings were taken respecting it, they wished to know the probable cost of the Act, and I told them that it would be, if unopposed, as I thought, not less than 700*l.*, and not more than 800*l.*; and, as the directors will no doubt have informed you, it has not amounted to the less sum."

On the 2nd of February, 1857, Mr. *Strother* wrote to the directors, giving them notice, that, from that day, he should charge interest upon his bill until payment.

The petition was not presented until after the expiration

of more than twelve months from the date of the delivery of the bill of costs.

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In re
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Statement.

After service of the petition, the respondent wrote to Mr. *Dawson*, proposing to refer the bill to a respectable London solicitor acquainted with parliamentary business; which however the company declined.

Mr. *Hardy*, for the petitioners, contended that the charges above mentioned were gross overcharges, and amounted to "special circumstances" within the meaning of that phrase in the 37th section of the Act.

Argument.

Mr. *Wickens* for the Respondent:—

Mere overcharge is not a "special circumstance." To bring the case within the clause, "except under special circumstances," it is incumbent on the petitioners to shew not only that the bill contains overcharges, but that the overcharges could not have been discovered to be such earlier. "The circumstances must be such as to afford a reasonable excuse for not applying sooner, not circumstances of which the client could reasonably have availed himself before:" per Lord *Cranworth*, L. J., *In re Barnard* (a). Here, if these are overcharges, the petitioners had as good means of knowing that they were so in February, 1856, as they have now.

Then, as to the correspondence, there is nothing to shew that the respondent led the petitioners to delay ulterior proceedings in the hope of an arrangement. Besides, it is still an open question, whether, since the Act 10 & 11 Vict. c. 69, the Court has jurisdiction to order a reference for taxation of a bill like the present.

1857.
 {
In re
 STROTHER.
 —
Argument.

The VICE-CHANCELLOR.—(To Mr. *Hardy*.)—I have no doubt as to the jurisdiction. The question is how you account for the delay.

Mr. *Hardy*, in reply, cited *Re Boyle* (a) and *Re Dickson* (b), to shew, that, even in the case of a petition for taxation after payment of a solicitor's bill, it was sufficient to shew fraudulent or extravagant overcharges; and, a fortiori, in a case like the present, where the bill remained unpaid.

The VICE-CHANCELLOR.—Is it the fact that the argument is a fortiori? Here the whole question is, whether, having had an entire year since the bill was delivered, and the assistance of a solicitor for eleven months of that time, you are entitled to a reference notwithstanding the provisions of the 37th section of the Act. However, I shall look at some of the cases before I dispose of the matter.

Judgment reserved.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In this case the facts are these:—In January, 1856, Mr. *Strother*, a solicitor, who had been retained by the petitioners to act for them in obtaining an Act of Parliament, delivered to the petitioners his bill of costs for business done by him as their solicitor. The petitioners were dissatisfied with the charges, but they did not apply to have the bill taxed until more than twelve months after it was delivered. Consequently, the rule being, that there can be no reference of an attorney's or solicitor's bill for taxation after the expiration of twelve months after such bill shall have been delivered, "except under special circumstances, to be proved

(a) 5 D. M. G. 540.

(b) 3 Jur. N. S. 29.

to the satisfaction of the Court,"(a) the only question I have to determine is, whether in this case such special circumstances exist.

1857.
In re
STROTHER.
Judgment.

I have not been able to discover any satisfactory reason to account for the conduct of the petitioners in not making an earlier application to have the bill taxed; but at the same time there are charges appearing upon the face of the bill which were challenged by the petitioners at the time, and which, though challenged, were not explained; and not only so, but while these remained unexplained, the solicitor appears to have offered an explanation of other items, so that I am entitled to assume that he has offered all the explanation he has to make.

Then in that state of circumstances, I find in the bill of costs certain charges which I must say that I very much regret to find in a bill of costs of any officer of this Court. It appears that Mr. *Strother* carried the petitioner's bill through Parliament without any contest. He says in one of his letters, that when the directors, before any proceedings were taken respecting the application for the Act, wished to know the probable cost of the Act, he told them that, if unopposed, he thought it would be not less than 700*l.*; and now he says that, as it turns out, it does not amount to that sum. But that explanation is not enough. His own bill of costs amounts to upwards of 340*l.*, and among the items, I find no less than four of twenty-five guineas each for journeys to London. I find it asserted in the petition, and the assertion is supported by affidavit, and not at all explained by Mr. *Strother*, that as to three of these journeys he was absent from home only three days, which at three guineas a day would amount to nine guineas; and that as regards the fourth, he was only necessarily

(a) 6 & 7 Vic. c. 73, s. 37.

1857.
In re
 STROTHER.
Judgment.

absent four days, which at three guineas a day would be twelve guineas only; making in the whole an overcharge of sixty-one guineas in a bill of costs, the total amount of which is 34*l.* 6*s.* 6*d.*

Then, again, I find that he has charged twenty-five guineas under the head of "sessional fee." Now, it appears from the list of charges prepared by the Speaker in pursuance of "The House of Commons Costs Taxation Act, 1847," that "when a parliamentary agent is employed, the solicitor will not be entitled to the sessional fee, but may charge from two guineas to ten guineas, according to circumstances, in respect of his ordinary communications with such agent, with reference to the progress of the bill through its various stages, when no professional advice or instruction is given." Now, here a parliamentary agent was employed; and no professional advice or instruction was given: consequently the utmost that Mr. *Strother* could have been entitled to charge in respect of his communications with the parliamentary agent was ten guineas. So that, in respect of this item, there is an overcharge of fifteen guineas, making with the others I have mentioned an overcharge upon five items of nearly 80*l.* in a bill of 34*l.* 6*s.* 6*d.*

I do not deal with the item of 30*l.* charged in respect of the certificate of new shares, which the solicitor has attempted to explain. I confine myself to the items I have mentioned, and which he has left wholly unexplained. Those items alone, according to the rule adopted by Lord *Cottenham* in *Horlock v. Smith* ^(a), would have afforded sufficient ground for a reference to taxation,—even if the bill had been paid, and notwithstanding the absence of pressure on the part of the solicitor,—upon the ground that they are such gross overcharges as to amount, in the language of the cases on this subject, to fraud.

(a) 2 My. & Cr. 495.

At the same time, I wish to say for this gentleman, that I do not find that there has been any intention on his part to commit a fraud. As was said by Lord Justice *Turner* *In re Dickson* (a), I make no imputation upon the solicitor; he may have charged no more than he considered himself honestly entitled to charge. But, notwithstanding that, charges may be such overcharges that this Court must hold them evidence of fraud.

1857.
In re
STROTHER.
Judgment.

In this case, the solicitor, when he is first applied to by Mr. *Dawson* on behalf of the petitioners, writes in reply, that he has only made such charges as he considered fair and reasonable, and in accordance with the usual professional practice for parliamentary business; and adds:—"And the reason for the dissatisfaction of some of the directors I can only account for by their not being conversant with that kind of business." That representation I cannot look upon as correct. Had the directors been more conversant than they were with parliamentary business, they would but have had the more reason for dissatisfaction with a bill of costs in which twenty-five guineas is charged for what is called a "sessional fee," when ten guineas was the utmost to which the solicitor was entitled under the Speaker's list of charges.

The only difficulty I find in the matter is this, that after the bill is delivered, the petitioners place themselves in the hands of Mr. *Dawson*, who, as early as the 29th of February, 1856, writes to Mr. *Strother*, informing him that they appear greatly dissatisfied with the charges, and wish him to get the bill taxed for them. Why that taxation was so long delayed is certainly unexplained. Nothing material passes until February, 1857, and then Mr. *Strother* writes to the directors, that, as they have already had un-

(a) 3 Jur. N. S. 29.

1857.
In re
STROTHER.
Judgment.

usually long credit, and no time is mentioned when they intend settling the account, he must claim interest upon the bill; and he then proceeds to give them notice that from that day he will charge interest thereon until payment.

In that state of things, therefore, the matter had continued during the twelve months from the delivery of the bill, at great hazard, no doubt, to the petitioners. Still there was no intimation of any intention on their part to withdraw from their resolution to have the bill taxed, nor was there on the part of the solicitor any demand for payment of his bill within the twelve months; and it appears to me, that, under these circumstances, I cannot hold that the petitioners have lost by any laches on their part the right which they would otherwise have, under the circumstances of this case, to have this bill referred for taxation.

The case cited by Mr. *Wickens*, of *In re Barnard*(a), is very different from the present, and the only part of it with which I was pressed was an observation which fell from the Lord Chancellor. The facts there were these:—An action of debt having been brought by an attorney against his client for his bills of costs, the client obtained an order from one of the Judges of the Court in which the action was brought to tax the bills. The attorney then obtained an order to dismiss the summons to tax, unless within a week the Defendant should consent to withdraw all his pleas except “never indebted,” in which case all the bills were ordered to be taxed. The client accordingly withdrew all his pleas except “never indebted,” and he in consequence remained in possession of the order to tax the bills. But, instead of proceeding with the taxation, the client thought it better to withdraw his only remaining plea in the action, the necessary consequence of which was, that

(a) 2 D. M. G. 359.

the attorney was entitled to sign judgment in the action. That judgment was accordingly completed, and was final. Afterwards the client again applied to a Court of common law for taxation, which he might have had before, and from which he had in effect receded; and, that application being refused with costs by a Judge at chambers, instead of appealing, as he was entitled to do, to the full Court, he presented a special petition for taxation to this Court; and the Court doubted whether, the jurisdiction having been equally in this Court and the Court of law, and the Court of law having been first applied to, this Court had any power to deal with the matter. There, too, there was a deliberate withdrawal, on the part of the client, of all his pleas which entitled the Plaintiff to sign judgment in the action; and, moreover, there was no item which could be called a gross overcharge in the bill of costs. The decision, therefore, in that case was clear.

1887.
In re
STROTHER.
Judgment.

The observation, however, which fell from the Lord Chancellor, then Lord Justice, is this. He says: "If application is made on the ground of special circumstances, after the lapse of the prescribed time, the circumstances must be such as to afford a reasonable excuse for not applying sooner, not circumstances of which the client could reasonably have availed himself before" (a). That observation, taken literally and in its full force, would overthrow many cases of taxation, since there are many cases which have been held to be proper for taxation where, nevertheless, the client might have applied sooner, and where the circumstances did not afford a reasonable excuse for his not doing so.

The rule on this subject is sufficiently clear. To entitle a client to an order for taxation of his solicitor's bill of costs, after the expiration of twelve months from its delivery, he

(a) Id. p. 364, 365.

1857.

In re
*STROTHER.**Judgment.*

must shew one of two things,—either pressure, or gross overcharge, amounting to what this Court designates as fraud. Either of these being shewn, the bill may be referred for taxation; it is not necessary that both should concur; and where there has been no pressure, still the case may be one for taxation.

In the present case, what I rely upon is, first, the grossness of the overcharges to which I have referred; secondly, the misrepresentation on the part of the solicitor in attempting to justify the largeness of the items, as being in accordance with the usual professional practice for parliamentary business; and, thirdly, the absence of any demand for payment of his bills until the twelve months had expired; and then what he says is, "In order to avoid expense and further contention, I propose to refer the bill to a respectable London solicitor acquainted with parliamentary practice."

I must, therefore, order the bill of costs to be referred for taxation; but the petitioners must undertake to pay interest at four per cent. on the amount of the bill as taxed from one month after its delivery in 1856.

Minute of
order.

Ordered accordingly. The costs of the petition to await, and be according to taxation.

1857.

SALUSBURY v. DENTON.

July 22nd
and 24th.

LYNCH BURROUGHS, by his will in 1835, referring to a policy of insurance which he had settled upon his marriage, upon trust as to 2000*l.*, part of the proceeds, for his wife absolutely, and, as to the residue, upon certain trusts under which, in the event of her surviving him, she was entitled to a life interest therein, with remainder to himself absolutely, proceeded to dispose of his interest as follows:—

“Now with reference to my policy in the Equitable, No. —, as settled by my marriage settlement on my dear wife, with absolute disposal of 2000*l.* thereof if she survive me, I leave the same, on her decease, to be divided (whatever may have proved the amount of the claim) one moiety thereof to my daughter,” the plaintiff, “(if living) for her life therewith, and the other moiety to be at the disposal, by her will, of my dear wife therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe herself; and the remainder of said moiety to be at her disposal among my relatives, in such proportions as she may

Will—Charity
—Mortmain
—9 Geo. 2, c. 36—“Foundation”
—Trust
—Discretion
—Uncertainty
—“Relatives”
—Statutes of Distribution.

Bequest of a fund to be at the disposal of testator's widow by her will therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of O. as she may prefer, and under such restrictions as she may prescribe, and the remainder to be at her disposal among tes-

tator's relatives as she may direct. *Held,*

First—That whatever might be the effect of a bequest “for the foundation of a charity school,” a bequest “for the foundation of a charitable endowment” was a lawful bequest, and not void under the stat. 9 Geo. 2, c. 36.

Secondly—That the words “to apply” and “to be at her disposal” were clearly sufficient to create a trust.

Thirdly—That although the fund was to be applied “as to a part” (without saying what part) for one set of objects and as to “the remainder” for another, and the widow died without exercising her power of determining the proportions in which each were to take, the bequest was not void for uncertainty, but the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes and the other to the testator's relatives.

Fourthly—That, although the widow might have exercised her power in such a manner as to include more distant relatives, still, as she had died without so exercising it, none could take as “relatives” but such as were capable of taking within the Statutes of Distribution.

1857.
 SALUSBURY
 v.
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 Statement.

be pleased to direct." The testator bequeathed his residuary personalty to his wife as his sole residuary legatee.

By a codicil to his will the testator gave the first mentioned moiety to Sir Charles Salusbury absolutely, subject to the plaintiff's life interest therein.

The testator died in 1837, leaving the plaintiff his only child.

His widow died in 1856, without having made any will or any disposition of the second moiety; and administration of her estate and effects was granted to the defendant *Maria Newberry*.

The proceeds of the policy were now represented by 11,619*l.* 16*s.* 2*d.*, 3 per cent. Consols.

The bill prayed that the trusts of the will, so far as related to this sum, might be carried into execution under the direction of the Court.

Argument.

Mr. *Rolt*, Q. C., and Mr. T. C. *Thompson*, for the plaintiff,

Claimed the whole of the moiety over which the widow had a power of disposition.

A bequest for "the *foundation* of a charity school" was void under the statute 9 Geo. 2, c. 36; and although there was an alternative, in favour of another charitable endowment, that did not bring the case within the authority of *Sorresby v. Hollins* (a), because it was to be "*such other* charitable endowment," which brought it back to the former words, "*foundation* of a charity school;" which, requir-

(a) 9 Mod. 221.

ing something new to be built, had a tendency to bring new land into mortmain, and was therefore void: *Attorney-General v. Williams (a)*, *Longstaff v. Rennison (b)*, *Dunn v. Bownas (c)*, and *Philpott v. St. George's Hospital (d)*.

1857.
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Argument.

The whole of the moiety in question became, therefore, subject to the trust in favour of the testator's "relatives." Now a bequest to "relatives," without saying *what* relatives, is limited to such relatives as are capable of taking within the Statutes of Distribution, for the relation may be infinite: per Lord *St. Leonard's (e)*. And although the widow might have exercised her power so as to include a larger class, as she has died without doing so, the power is gone; and the plaintiff therefore, as the testator's only child, is entitled to the whole: *Harding v. Glyn (f)*, *Cole v. Wade (g)*.

Mr. Cairns, Q. C., and Mr. G. L. Russell, for Sir Charles Salusbury, did not dispute the plaintiff's right to a life interest in the other moiety of the fund.

Mr. Daniel, Q. C., and Mr. Bazalgette, for the Defendants *Newberry* and *Maria*, his wife,

Contended that, the widow having died without exercising her discretionary power of determining what part was to go to charitable purposes, and what part was to go to the testator's relatives, it was impossible for the Court to exercise that power, and the gift to each was void for uncertainty: *Porter v. Fox (h)*. As to the whole of the second moiety, therefore, the gift failed; and the moiety passed

(a) 2 Cox, 387.

(b) 1 Drew, 28.

(c) 1 K & J, 596.

(d) 25 Law Journ. N. S. Ch. 33; S.C. reversed on appeal by the House of Lords, 24th July,

(d) 21. B. 134: 6. H. of L. 338

1857, since the hearing reported in the text.

(e) 2 Sug. Pow. 237.

(f) 1 Atk. 469, S.C. 5 Ves. 501.

(g) 16 Ves. 27.

(h) 6 Sim. 485.

1857.
 SALUSBURY
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Argument.

under the residuary bequests to the testator's relatives, now represented by the defendant *Maria Newberry*.

Harding v. Glyn, and *Brown v. Higgs (a)*, would be cited on behalf of the Crown, to shew that, the widow having died without exercising her power, the Court would divide the fund equally: but, in both of those cases, the Court was of opinion, upon the whole of the will, that there was a duty and obligation imposed upon the donee of the power to exercise it, and that equality was intended. Here the power was not in the nature of a trust, but like that in *Brown v. Pocock (b)*, where it was left to the donee to exercise it or not at discretion.

Mr. *Wickens*, in the absence of the *Attorney General*, for the Crown,

Claimed one half of the moiety in question for charitable purposes. If a gift for "the foundation of a charity-school" would have been bad, taken alone, here there was a clear option to prefer some "such other charitable endowment" as was specified in the will; and where there is an alternative to select either of two charitable objects, and one only is void under the statute, the Court upholds the gift in favour of the other; as in the late case of a bequest for founding a hospital within ten miles of London or of Dublin.

Then, as to the argument from uncertainty, this is clearly a trust,—a direction which the widow was under an obligation to obey; and, as she died without obeying it, the Court, acting on the maxim that equality is equity, would divide the moiety in question, and give one half to charitable purposes: *Malim v. Keighley (c)*, *Brown v.*

(a) 4 Ves. 708, S. C., affirmed on rehearing, 5 Id. 495, and on appeal 8 Id. 561.

(b) 6 Sim. 257.
 (c) 2 Ves. jun. 333, S. C. affirmed on appeal. Id. 529.

Higgs (a), Birch v. Wade (b), Burrough v. Philcox (c), Fordyce v. Bridges (d).

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Argument.

Mr. Thompson in reply cited *Falkner v. Butler (e)*, and *Clowes v. Clowes (f)*.

The VICE-CHANCELLOR—I have a very clear opinion that a bequest to the charitable purposes mentioned in this will would not be void, for it is certain that we often speak of *founding* a charity, without any intention in any way connected with land. Here there is a clear option “to apply a part to the foundation of a charity-school, or *such other charitable endowment* for the benefit of the poor of Offley as she may prefer.” It is clear that one may found a charitable endowment without violating the statute; and as to the word “such,” that does not relate back, as it was argued, to “a charity school,” but refers to what follows, the words “as she may prefer.”

The other point, as to the uncertainty of the trust, in reference to which *Fordyce v. Bridges* was cited, will require a little consideration.

Judgment reserved.

His Honor was afterwards referred to *Deyley v. The Attorney-General (g)*, and *Down v. Worrall (h)*.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

July 24th.
Judgment.

The question in this case arises upon the will of *Lynch Burroughs*, who having, upon his marriage, settled a certain

(a) *Ubi supra.*

(b) 3, *Ves. & Bea.* 198.

(c) 5 *My. & Cr.* 73.

(d) 2 *Phil.* 497.

(e) 1 *Ambr.* 513.

(f) 9 *Sim.* 403.

(g) 4 *Vin. Abr.* 485, 486.

(h) 1 *My. & K.* 561.

1867.
 SALUSBURY
 v.
 DENTON.
 —
Judgment.

policy of insurance upon trust, as to 2000*l.* part of the proceeds for his wife absolutely; and as to the residue upon certain trusts under which, in the event of her surviving him, she would be entitled to a life interest therein, with remainder to himself absolutely, by his will disposes of his interest as follows:—[His Honour read the passage from the will set out above.] Then by a codicil the testator bequeathed the moiety, in which his daughter has a life interest, to Sir *Charles Salusbury*, subject to the life interest of his daughter, so that the only question is as to the second moiety.

As regards this second moiety, he directs it to be at his wife's disposal by her will "*to apply* a part to the foundation of a charity-school or such other charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe herself, and the remainder to be at her disposal among his relatives in such proportions as she may be pleased to direct."

The first question that was argued was, whether as to the part intended by the testator for charitable purposes, the gift was or was not void; and as to this part of the case I have no doubt, as I said at the close of the argument, that it was not void, because under the terms of the will the widow had an option,—she was at liberty to apply that part "to the foundation of a charity-school, or such other charitable endowment," as in the will mentioned. And whatever may be the effect of the words "foundation of a charity-school," occurring in the first branch of that alternative, it is clear as to the second,—the foundation of a charitable endowment,—that a bequest for such a purpose would be a lawful bequest, and not void under the stat. 9 Geo. 2, c. 36.

The gift, therefore, amounts to a bequest of the fund in

question to be at his wife's disposal by her will, therewith "to apply" a part to the foundation of such charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe, and the remainder "to be at her disposal among" the testator's relatives in such proportions as she may direct.

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Now, if either of these purposes had been mentioned alone, the case would be disposed of at once. The words "to apply," "to be at her disposal among," are much stronger in favour of construing this as a trust than those in *Brown v. Higgs*, where the words, "I authorise and empower," might have been said to create a mere authority, and not a trust. And this is clearly the view which Lord St. Leonards takes of a will like the present, in his treatise on "Powers," where he is discussing the case of the *Duke of Marlborough v. Lord Godolphin* (a), and that of *Harding v. Glyn* (b). Admitting that there was a distinction between the two cases, he says, in effect, that where there is a power of selection among certain objects, and an intention manifested that the objects should not be disappointed,—for instance, where there is a bequest to the testator's wife for life, and after her decease *to be divided or distributed* amongst such of his children as she should appoint,—as the right to exclude some, does not prevent the class from taking in default of appointment, it would now be held, notwithstanding the decision in the *Duke of Marlborough v. Lord Godolphin*, that the children take in default of appointment, either by implication, or because the power is coupled with a trust (c).

Here, I can have no doubt that the words "to apply" and "to be at her disposal among," are clearly sufficient to

(a) 2 Ves., sen., 61.

(b) 1 Atk. 469, S. C. 5 Ves. 501.

(c) 2 Sug. Pow. 163.

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create a trust; and that if this had been simply a bequest of the whole, to be at the widow's disposal among the testator's relatives in such proportions as she might direct, the widow dying without having so disposed of it, the whole would go to the plaintiff, as the testator's only child, and the only one of his relatives capable of taking within the Statutes of Distribution (a); although, having this power of disposal among his "relatives," the widow might have exercised it, had she been so minded, in such a manner as to include persons more distantly related to the testator (b).

Then the question arises, whether the bequest in this case is void for uncertainty, it being only to be at the disposal of the widow "as to a part" (without saying what part) for one set of objects, and "as to the remainder" for another.

In reference to this part of the case, *Fordyce v. Bridges* (c) is an authority in point. There the bequest was upon trust that the trustees, or the survivor of them, or the executors, administrators, or assigns of such survivor, should invest the residuary personal estate in the purchase of estates in England or Scotland; such estates, if in England, to be settled upon one set of trusts, and if in Scotland, upon another. The trustees invested the greater part of the residue in Scotch estates, and died; and, the Court being of opinion that the discretionary power of selecting between English and Scotch investments was, under the circumstances, at an end, it was held, upon a rehearing, that the fund remaining uninvested became divisible in equal moieties, one half upon the uses of the English estates, and the other upon those of the Scotch: although the trustees, had they been so minded, might have exercised

(a) See 2 Sug. Pow. 237. (b) See *Harding v. Glyn*, ubi supra.

(c) 2 Phil. 497.

their discretionary power so as to entirely vary those proportions.

So again, in the case of *Longmore v. Broom* (a), where the testator bequeathed all his personal estate to his executors upon trust that they should apply and dispose of his personal estate unto and amongst his two brothers Joseph and Benjamin, and his sister Hannah, or their children, in such shares and proportions, and at such time or times, as they, his trustees, or the major part or the survivor of them, his executors or administrators, should in their discretion think proper; Sir *W. Grant* said, "The inclination of my opinion is, that the children have an interest. This is not a direct bequest to the objects; but a bequest to the executors, with an authority to dispose among them. The cases are very different. In the former, the Court must, of necessity, construe those words; for they bear no sense of themselves. You cannot execute that intention. You must either alter the word 'or' to 'and,' and say the children are to take either with or after their parents; or, letting the word 'or' stand, suppose a contingency in contemplation,—'to the parent, if the parent is living; to the children, if the parent is not living.' But, in either case, you must make some addition to the bequest; otherwise, it would be void for uncertainty. A bequest 'to A. or B.' is void; but a bequest 'to A. or B. at the discretion of C.,' is good: for he may divide it between them. That is the case of this will (b)." Then he says that the executors had a discretion to say to whom the fund should be given—the parents or the children; but the Court had not that discretion, but must give the fund equally between the parents and the children, although the executors themselves were not so restrained.

I have been referred, since the argument, to two cases, as

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(a) 7 Ves. 124.

(b) Id. 128.

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bearing upon this question, and which have been supposed to be in conflict with each other: viz., the case of *Doyley v. The Attorney General* (a), and that of *Down v. Worrall* (b).

The first of these—the case of *Doyley v. The Attorney General*—was very similar to the present. There the property in question was bequeathed in trust for certain purposes, and, subject thereto, the trustees and the survivor of them, and the heirs and executors of the survivor, were to dispose of it to such of his relations, of his mother's side, who were most deserving, and in such manner as they thought fit, and for such charitable uses and purposes as they should also think most proper and convenient; and the Master of the Rolls (Sir *Joseph Jekyll*) directed, that one half of the estate should go to the testator's relatives on the mother's side, and the other half to charitable uses; the known rule that equality is equity being, as he said, the best measure to go by.

It appears to me that there is no possibility of distinguishing that case from the present; for there can be no substantial difference between a direction to dispose of property to such relations and for such charitable purposes as the trustees should think most proper, and a direction like the present to apply. "a part" to such charitable purposes "and the remainder" among relatives with a like discretion. The two cases cannot be distinguished.

The case of *Down v. Worrall* (b) will be found on examination not to conflict with that to which I have last referred. In *Down v. Worrall* the testator left part of his residuary personal estate to his trustees to settle it either to or for charitable or pious purposes, at their discretion, or

(a) 4 Viner's Abr. 485, 486.

(b) 1 My. & Kee. 561.

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otherwise for the separate benefit of his sister and all or any of her children, in such manner as his trustees should think fit. And there it was held, that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next of kin.

Now, whether that case can or cannot be reconciled with all the others on this subject, it is very clearly distinguished from the present: for it is one thing to direct a trustee to give *a part* of a fund to one set of objects, *and the remainder* to another, and it is a distinct thing to direct him to give "either" to one set of objects "*or*" to another. *Down v. Worrall* was a case of the latter description. There the trustees could give all to either of the objects. This is a case of the former description. Here the trustee was bound to give a part to each.

I am therefore of opinion, that, even if the case of *Down v. Worrall* can be reconciled with the other authorities on this subject, it cannot affect my decision in the case before me. Here there is a plain direction to the widow to give a part to the charitable purposes referred to in the will as she may think fit, and the remainder among the testator's relatives as she may direct. And the widow having died without exercising that discretion, the moiety in question must be divided equally.

There will be a declaration, that, as to one moiety, Sir *Charles Salusbury* is entitled absolutely, subject to the Plaintiff's life interest therein, and that the other moiety is divisible in equal parts, one of such parts to be for charitable purposes, and the other for the Plaintiff absolutely, as the only person entitled under the Statutes of Distribution. There must also be a reference to chambers to settle a scheme for the application of the part devoted to charitable purposes.

1857.

July 22nd.

KENNEDY v. SEDGWICK.

Will—Construction—Vested Interests—Gift over, contradictory—“Leaving” construed as “having.”

Bequest upon trust to pay and divide equally to and amongst all the children of testator's daughter when the youngest should attain 21, followed by a gift over in case of the death of his daughter “without leaving any child or children.”—*Held*, the youngest child having attained 21, that the fund was divisible equally amongst all the children, and that such interests were not defeasible in the event of the death of the testator's daughter without leaving any child or children.

In such a case, the gift over being contradictory if the word “leaving” be construed literally, that word will be read as equivalent to “having.”

MILES BURTON, by his will in 1820, after giving an annuity to his daughter *Elizabeth Kennedy*, directed his trustees, in case of the death of his said daughter leaving any child or children who should live to attain twenty-five years, being a son or sons, to convey and assure all his real estate to the eldest of such sons, if more than one; and, if only one, then to such only son, his heirs or assigns, on his attaining twenty-five years; but, if there should be no son, then to sell his real estate, and the proceeds to sink into and become part of the residue of his personal estate. And he directed his trustees to stand possessed of the clear residue of his estate and effects (subject to certain contingent pecuniary legacies), and all accumulations of interest thereof, upon trust, to pay and divide the same equally to and amongst all and every the child and children of his said daughter, when the youngest of such children should attain twenty-one. The will then contained a proviso, that, in case of the death of his said daughter “without leaving any child or children,” the trustees were to convey his real estate to the sons of his late sister *Ann*, as tenants in common, and to assign and transfer the residue of his personal estate unto and amongst all the children of his said deceased sister, both sons and daughters.

Elizabeth Kennedy had nine children, all of whom attained twenty-one. It appeared that she was now a widow, and fifty-seven years of age. It was conceded that the devise of the real estate was void for remoteness.

Mr. Rolt, Q.C., and Mr. Giffard, for the Plaintiffs, the sons of *Elizabeth Kennedy*; and Mr. Greene, for the daughters, who were Defendants in the same interest,—contended, that, there being a gift of the clear residue of the testator's estate and effects to all the children of *Elizabeth*, under which all such children took a vested interest, the gift over in case of the death of *Elizabeth* without leaving any child was contradictory. The Court, therefore, would read the word "leaving" as equivalent to "having," as had been done in many similar wills: *In re Thompson's Trusts*(a), *Maitland v. Chalie*(b), *Casamajor v. Strode*(c), *Ex parte Hooper*(d), and *Marshall v. Hill*(e).

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Argument.

Mr. Sandys, for the children of *Ann Holgate*, contended, that as to the real estate there was no vested interest in the children, consequently there could be no pretence as to that part of the testator's property for applying the rule of construction contended for by the children of *Elizabeth*; and as to the personalty, he submitted that the word "leaving" must be construed literally.

Mr. Prendergast for the testator's daughter *Elizabeth*.

The VICE-CHANCELLOR said, without hearing a reply, that the case was clearly one which fell within the rule of construction adopted in the authorities that had been referred to; and, that there being a gift of the residue under which all the children of *Elizabeth* had acquired vested interests, the gift over in case of the death of *Elizabeth* without leaving any child was contradictory, if the word "leaving" were read literally; and that the word "leaving" must

Judgment.

(a) 5 De G. & S. 667.
(b) Madd. & Gel. 243.
(c) 8 Jur. 14.

(d) 1 Drew. 264.
(e) 2 Mau. & Selw. 608.

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be read as equivalent to "*having*." There would, therefore, be a declaration as follows:—

DECLARE that the devise of the real estate to vest at twenty-five is void for remoteness. And as to the personal estate, the youngest child of the testator's daughter *Elizabeth* having attained twenty-one, and it appearing that *Elizabeth* is now fifty-seven years of age, declare that the personal estate is now divisible equally among all the children of *Elizabeth* now living, and the personal representatives of such as are deceased, and that such interests are not defeasible in the event of the death of *Elizabeth* without leaving any child or children.

WHATELEY v. SPOONER.

July 17th.

Will—Unattested Document—Parol Evidence—Construction—“which” for “as”—“Sums of Money”—Shares.

Direction in a will, that “all and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a state-

ment in my handwriting,” should be brought into hotchpot:—*Held*, that a subsequent unattested statement in testator's handwriting was admissible in evidence of advances; the Court construing “which” as meaning “as,” and the clause “as will appear,” &c., as mere words of reference, forming no part of the identification of the subject.

But such unattested document cannot be looked upon as proving that an advance was made which was not actually made, nor conversely; and a direction therein, that shares so advanced, and which had become depreciated in value, should be estimated at their selling price at the time when the estate should be divided, is inadmissible.

“Sums of money” in a will, held to comprise personal estate generally.

pot, and accounted for by each child as part of my estate and effects, previous to a division thereof."

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 Statement.

Amongst the testator's papers, kept by him in a private box, there was found after his death a paper in his handwriting, and signed by him, but not attested, which was headed thus:—"An account of money which I consider as advances to my children respectively, and to be reckoned as such in reference to the distribution of my property under a will made by me, and dated August, 1843." This paper contained an enumeration of several advances therein stated to have been made to the testator's children, the total amounts being as follows:—To *Lucy*, 1425*l.*; to *Charlotte*, 3000*l.*; to *Isaac*, 5264*l.*; and to *Frances*, 3226*l.* The advances to *Charlotte*, *Isaac*, and *Frances* appeared by the account to have consisted in part of canal shares and securities.

The paper concluded as follows:—"These canal shares and securities having been so much depreciated by railroads, it is my desire, that, in the distribution of my property amongst my children, the value of those shares and securities shall be estimated to each child at the selling price of such shares and securities at the time when the division amongst them takes place under my will. *Isaac Spooner*. April 7, 1845."

The testator died in January, 1849.

The bill prayed that the rights and interests of the testator's children under the will might be ascertained and declared.

Mr. *Rolt*, Q. C., and Mr. *G. L. Russell*, for the Plaintiff
Lucy:—

Argument.

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In the division of the testator's estate the paper writing of the 7th of April, 1845, ought to be treated as conclusive evidence of the testator's intention; and the advances mentioned in that document, and those advances only, ought to be brought into hotchpot. The authorities shew that a will may refer to extrinsic evidence for the purpose of determining the donee or the subject matter of the devise, *Stubbs v. Sargon* (a); where the devise was to the persons who should be in copartnership with the testatrix at the time of her decease, or to whom she should have disposed of her business; and it is immaterial whether such extrinsic evidence is or is not in writing, or whether, if in writing, it is or is not attested.

But if the paper writing in question is not to be treated as conclusive evidence of what has, and what has not been advanced, it will at least be treated as *prima facie* evidence that the advances therein mentioned to have been made, were in fact made. And the Court will direct regard to be had to its contents in the inquiry to be made.

If the paper writing is to be disregarded altogether, still all advances which can be shewn by other evidence to have been made, must be brought into hotchpot, that being clearly the intention of the testator according to the true construction of the clause in the will.

Mr. *Shapter*, for the Defendant *Frances*, and Mr. *Haines*, for the Defendant *Charlotte*, were desirous, upon moral grounds, that the document should be admitted; but, if admitted at all, it should be admitted in toto, and so as to carry out the testator's intention relative to the canal shares and securities which had become depreciated in value; and to this the Plaintiffs objected.

(a) 2 Keen, 255; S. C., affirmed on appeal, 3 My. & Cr. 507.

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Upon legal grounds the document is inadmissible. The testator could not by his will reserve to himself a power of directing by a subsequent unattested document what sums are to be brought into hotchpot. Yet this is what he attempts to do by the clause in question in the will, the true construction of which is this, "All and every such sums of money . . . as will appear in a statement in my handwriting." The latter words are a portion of the identification of the subject, and not a mere vicious addition. In all the cases in which effect has been given to references to unattested documents, or to the incorporation of unattested documents in wills, the wills in question were made before the operation of the late Wills Act, and were restricted to personal property. When real property as well as personal was included, as in *East v. Twyford (a)*, an unattested document was held inoperative as to the former.

Then as to *Stubbs v. Sargon (b)*, it depended on an act of another person, as well as on an act of the testatrix, who should be her devisee, and the decision is not an authority that a devise may be made to depend on a future act of the testator solely; and although it is true that Lord *Cottenham's* reasoning would appear to go to that length, it is clear that there must be some limitation in this respect, for the writing of a paper pointing out the name of the devisee would be "an act of the testator," and to admit such a paper, if unattested, would be in direct contravention of the recent Wills Act (c).

Mr. *Traill* appeared for the trustees of the will.

Mr. *Rolt*, Q. C., in reply:—

The words "all and every such sums of money which I

(a) 4 H. L. C. 517. (b) 3 My. & Cr. 507. (c) 1 Jarm. Wills, 356.

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have already advanced," &c., are to be read "all and every such sums of money as I have already advanced," &c. And the subsequent words, "as will appear in a statement in my handwriting," are to be read in a parenthesis, and so as not to form a necessary part of the description of the sums of money in question. The words "as will appear" are used in the sense in which they occur in pleadings in Chancery, as in *England v. Downs*(a), where there was an assignment of all and every the household goods, and all other the effects of the assignor, the particulars whereof were stated to be more fully set forth and expressed in an inventory thereof signed by the assignor and thereunto annexed; and there was in fact no inventory so signed or annexed: yet it was held that the deed was not void for want of it, and that the chattels might be ascertained by extrinsic evidence. If you may refer to the fact of advancement, you may refer to any document evidencing that fact; and if you may refer to such a document at all, you may refer to it for all purposes.

The VICE-CHANCELLOR.—Do you contend that the words, "sums of money" comprise the canal shares and securities?

Mr. Rolt.—We do. They comprise every description of property forming the subject of an advance.

The following cases also were cited: *Ross v. Cunyng-hame*(b), *Whytall v. Kay*(c), *Sanford v. Raikes*(d), *Habergham v. Vincent*(e), *Johnson v. Ball*(f), and *Wood v. Rowcliffe*(g).

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have considered this case during the argument, and it

(a) 2 Beav. 523, 536.

(b) 12 Ves. 29.

(c) 2 My. & K. 765.

(d) 1 Mer. 646.

(e) 2 Ves. jun., 204; S. C., 4 Bro. C.C. 353.

(f) 5 De G. & S. 85.

(g) 6 Exch. 407.

is clear to me that the words, "such sums of money," occurring in the clause in question in the will, refer to the clause "which I have already advanced," &c., the word "which" being used instead of "as," which would have been more proper, though "which" is often used in this manner in early English writers; and as to the clause "as will appear in a statement in my handwriting," those words are mere words of reference, as in the case of reference made to documents when produced, in Bills or Answers in Chancery. They do not refer back to the word "such," and form no part of the identification of the subject; so that the case is brought within that of *England v. Downs* (a).

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 Judgment.

A strong reason for this construction is, that the words "as will appear in a statement in my handwriting" must refer either to a document entirely future,—not commenced at the date of the will—or to a document, or running account, which the testator might possibly have already commenced, but which he had not completed at the date of his will; and, in either case, if I am to look upon the testator as having intended the statement to which he refers as the sole and conclusive evidence of his intention as to what was and what was not to be brought into hotchpot, his omission to leave a complete statement—and any accident might prevent his leaving a complete statement—of all advances would frustrate what was obviously a main intention of his will—that intention being manifestly, that all advances made to his children before the date of his will, or which might be made after that date, should be brought into hotchpot. The plain meaning of the testator is, "I intend this to be done; and I further mean to leave a document which will assist my trustees in carrying my intention into effect. I will assist in giving evidence to guide them by leaving a writing," and the case is clearly like that of *England v. Downs*.

Then, as to the question, to what extent the paper writ-

(a) 2 Beav. 523, 536.

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—
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ing in question is to be treated as evidence, it clearly cannot be looked upon as conclusively proving that an advance has been made which was not actually made; and, on the other hand, if it omits to mention any advance which has actually been made, that omission ought to be supplied.

Much less can I admit the direction at the close of the document, that the value of the canal shares and securities which have been depreciated shall be estimated at the selling price at the time when the division takes place. Those shares and securities must be brought into hotchpot at the value they had at the date when they were respectively advanced.

It was argued by Mr. *Shapter*, that, if I put this construction upon the will, I must direct the smallest sums—every sixpence that was ever given by the testator to any of his children—to be brought into hotchpot. But that result will not follow. The Court has its own habitual practice in reference to advancement to guide it in this respect; and, in the present case, I have the testator's own words that what is to be brought into hotchpot is, all and every such sums of money as he has already "advanced or covenanted to pay," or may thereafter "advance or covenant to pay" to his said children, or to the trustees of their marriage settlements.

I shall, therefore, declare that all sums of money, or other personal estate, paid or given by the testator to any of his children, or to the trustees of their marriage settlements, by way of advancement, or which he has covenanted to pay or give to his children, or to the trustees of their marriage settlements, ought to be brought into account in the division of his personal estate. There will then be an inquiry accordingly; and as to any personal estate so advanced other than money, there will be an inquiry what was the value of such personal estate at the time when the same was advanced.

1857.

EARP v. LLOYD.

July 13th.

THE bill averred that the Plaintiff was seised in fee of a certain field or piece of land situate at or near a place called *Oakeswell End*, in the parish of *Wednesbury*, in the county of *Stafford*, and known by the name of "*Oakeswell Piece*," with all mines, minerals, ironstone, and other substances in and under the same; and that, in July, 1856, the Plaintiff had received a letter signed by the Defendant *Lloyd*, on behalf of himself and his co-Defendants, whereby the Defendants gave him notice that they were entitled to and were the owners of all the mines and minerals in and under a certain piece of land, which they described as "situate in the parish of *Wednesbury*, at or near a place called *Oakeswell End*," and certain cottages adjoining thereto; "which said land and cottages," the Defendant's notice proceeded, "are now or formerly were called or known by the name of '*Finch Backs Farm*, otherwise *Pinch Backs Farm*.'" The bill then averred that the piece of land referred to in the said notice is the said field or piece of land called *Oakeswell Piece*, but the same was never called or known by the name of *Finch Backs Farm*, otherwise *Pinch Backs Farm*. The eighteenth paragraph of the bill contained a charge that all the mines and minerals in and under the Plaintiff's field called *Oakeswell Piece* belonged to the Plaintiff absolutely, together with the surface of the said field; and that, with reference to a deed of 1699, on which the Defendants relied as containing a reservation under which they claimed such mines and minerals, the said reservation, if any such there were, did not include the mines and minerals under that field or any part thereof, but must relate to some other land. The bill prayed that the Defendants might be re-

*Practice—
Discovery—
Evidence com-
mon to both
Parties—Ne-
gative Aver-
ment—Bound-
ary—
Parcels.*

Where the issue is, whether a piece of land called O, is or is not identical with or part of land called F., the Plaintiff averring the negative is entitled to production of whatever documents may aid him in establishing his negative averment, notwithstanding such documents may also evidence the Defendant's title.

Therefore, in a case of this description, the Defendant was ordered to produce all maps, plans, and terriers, and all deeds and other documents relating to the matters at issue, but with liberty to seal up such parts of to parcels.

the deeds and other documents as did not describe or relate

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strained from working ironstone or coal under the Plaintiff's land.

The Plaintiff having obtained an order for production of documents, the Defendants filed an affidavit setting forth a list of documents in their possession relating to the matters in the bill mentioned, including certain maps, plans, and terriers, deeds, and other documents, for which the Defendants claimed protection, on the ground that they related to and shewed or tended to shew their title to the mines and minerals in the bill mentioned, and to win and work the same; and that none of them in any manner shewed or tended to shew that the Plaintiff or any of the persons under whom he claimed had now or ever had any estate, right, title, or interest in or to the said mines and minerals, or any part thereof, or to the truth of any of the matters in the bill alleged.

The Plaintiff then took out a summons, which was now adjourned into Court for the production of the documents for which the Defendants by their affidavit sought protection.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Jolliffe*, for the Plaintiff, contended that the documents ought to be produced. The question was one of boundary; and although the documents might contain evidence common to both parties, as being the evidence of the title of both, the Plaintiff's right to discovery was not to be affected by that circumstance: *Burrell v. Nicholson*(a); and see Vice-Chancellor *Wigram's* "Points in the Law of Discovery," p. 325.

Mr. *James*, Q. C., and Mr. *Speed*, for the Defendants, resisted the application.

(a) 1 My. & Kee. 681.

The VICE-CHANCELLOR.—Has not the Plaintiff a right to see the parcels in your deeds having regard to the averments in the eighteenth paragraph of his bill? Otherwise the swearing is very like swearing to the contents of a document.

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Argument.

Mr. James, Q. C.—Here the Plaintiff's *prima facie* title is admitted, the Defendants admitting his title to the surface; consequently, the whole burthen of proof lies with the Defendants, who have to shew that the minerals were reserved, and the Plaintiff has no right to a discovery of that which relates exclusively to the way in which the Defendants will make out the issue they have tendered.

They cited *Bolton v. The Corporation of Liverpool* (a), and *Adams v. Fisher* (b).

The VICE-CHANCELLOR.—*Burrell v. Nicholson* is an authority in favour of the Plaintiffs. There it was a negative averment on the Plaintiff's part. He said, "I am not within the boundary;" and the Defendants were ordered to produce the rate-books and documents in their possession which might establish that averment.

[The case of *The Attorney-General v. Thompson* (c) was also cited.]

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The documents in question, so far as they describe or relate to parcels, must be produced.

Judgment.

(a) 1 M. & K. 88. (b) 3 My. & Cr. 546. (c) 7 Hare, 106.

1857.
 EARP
 v.
 LLOYD.
 ———
Judgment.

The case is this. The bill avers that the Plaintiff is seised in fee of a field or piece of land at or near *Oakeswell End*, known by the name of *Oakeswell Piece*, with the mines and other substances in and under the same. It then sets out a notice given to the Plaintiff by the Defendant *Lloyd*, that he or his co-Defendants are entitled to all the mines and minerals in and under a certain piece of land described in the notice as at or near a place called *Oakeswell End*, and as being now or formerly called or known by the name of *Finch Backs Farm*, otherwise *Pinch Backs Farm*; and then the bill avers, that the piece of land referred to in the notice is the said field or piece of land called "*Oakeswell Piece*," and that the same was never called or known by the name of "*Finch Backs Farm*, otherwise *Pinch Backs Farm*."

The whole issue, therefore, between the parties is, whether the field or piece of land called "*Oakeswell Piece*," is or is not identical with or part of land now or formerly called or known by the name of "*Finch Backs Farm*," otherwise "*Pinch Backs Farm*."

That being so, the case comes as near to that of *Burrell v. Nicholson* (a) as can be. There the Bill was for discovery in aid of an action to try whether the Plaintiff's house was within the parish of *St. Margaret, Westminster*, and liable as such to parochial rates, the Defendants being the parish officers and the vestry clerk of *St. Margaret's*. And the Court ordered the production of rate books and other documents, although containing evidence of the Defendants' title, upon the ground that the question was one of boundary, as the documents in question might afford negative evidence of the Plaintiff's title, by shewing that his house was not within the parish in question.

(a) 1 My. & Kee. 680.

And so in the case of *Smith v. Duke of Beaufort* (a), where the question was, whether the Defendant was bound to produce documents tending to prove that a custom or claim to dues demanded by him had varied at different periods as to the quantity of toll and in other respects, and thereby to impeach its legal existence and validity. The defence was that the documents were the Defendant's title-deeds, and evidenced his right to the duty in question; but the documents were ordered to be produced, upon the ground that they did not exclusively evidence the Defendant's title; they shewed the variations in the bill alleged to have taken place at different periods in the alleged custom or toll, and thereby tended to disprove the Defendant's title (b).

1857.
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 v.
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Judgment.

So here the deeds which evidence the Defendants' title may afford the strongest negative evidence to shew that the field or piece of land called "*Oakeswell Piece*," is not identical with, or part of, land now or formerly called or known by the name of "*Finch Backs Farm*," or "*Pinch Backs Farm*."

In fact, the object of this summons is not to have a discovery of title-deeds, as such, but to have a discovery of that which might have been contained in maps. Everything that describes or relates to parcels, everything that tends to shew boundary, ought to be produced.

There must be an order for production of the maps, plans, and terriers mentioned in the schedule; and also of the deeds and other documents mentioned in the schedule; but with liberty to seal up on affidavit such parts of the deeds and other documents as do not describe or relate to parcels.

Ordered accordingly.

(a) 1 Hare, 507; S. C., affirmed on appeal, 1 Ph. 209. (b) Id. 220.

1857.

Jan. 23rd &
24th.

*Costs—Parti-
tion Suit—
Costs previous
to Commission
—Infants.*

In a suit for partition, costs of infants, including as well the costs incurred before the issuing of the commission, as those incurred subsequently thereto, charged upon and ordered to be raised out of the shares allotted to such infants respectively in severalty.

COX v. COX.

THIS was a suit for partition, in which several of the Plaintiffs as well as of the Defendants were infants.

Upon the cause coming on for further consideration, and upon the question of costs,

Mr. *Baggallay*, in the absence of Mr. *Rolt*, Q.C., for the Plaintiffs, asked that the costs of the infants, whether Plaintiffs or Defendants, including as well costs incurred before the issuing of the commission as those incurred subsequently thereto, should be charged upon and raised out of the shares allotted to them respectively in severalty. Any other order would bear unjustly upon the next friend or the adult Plaintiffs.

Mr. *W. Pearson*, for the infant Defendants, opposed the application.

The VICE-CHANCELLOR said, that, unless some precedent could be cited as an authority, he felt a difficulty in ordering the costs incurred previously to the issuing of the commission to be charged upon the shares of parties under disability.

The cause stood over for inquiry whether any precedent could be found for such an order.

Jan. 24th.

Mr. *Baggallay* now cited the case of *Singleton v. Hopkins* (a), in which, in a partition suit, where a lunatic was tenant in tail in possession, the share allotted to him in severalty was ordered to bear the costs not only of such lunatic, but of other parties interested in that share in remainder expectant upon the estate tail.

• The VICE-CHANCELLOR thereupon made the order.

1857.

IN RE LAZARUS.

Aug. 4th.

THIS was a petition for payment out of court of a fund paid in by trustees under the Trustee Relief Act.

It appeared that the trustees had taken copies of the affidavits of the parties claiming to be beneficially interested in the fund.

Costs—Trustee Relief Act—Trustees taking Copies of Affidavits.

Trustees who have paid trust funds into court under the Trustee Relief Act, and take copies of affidavits of parties claiming to be beneficially interested in the fund, will not be allowed their costs of the copies of affidavits so taken by them.

Mr. Cairns, Q. C., and Mr. Aston, for the Petitioners, contended that the trustees ought not to be allowed the costs of the copies of affidavits so taken by them.

Mr. Willcock, Q. C., and Mr. Bilton for the Respondents.

Mr. J. Pearson for the Trustees.

The VICE-CHANCELLOR said, that on this occasion he would not interfere with the discretion of the taxing master; but he wished it to be distinctly understood that in future, at least in this branch of the Court, trustees who, having paid trust funds into court under the Trustee Relief Act, chose to take copies of affidavits of parties claiming to be beneficially interested in the fund, would not be allowed the costs of the copies of affidavits so taken by them. The trustees were mere stakeholders claiming no beneficial interest, and if such a practice existed, it was high time to stop it (a).

Judgment.

(a) Similar observations were made by His Honour on the preceding day, upon a petition in the matter of *O'Hara's Tontine*, which stands over for the present for further evidence.

1857.

July 23rd.

CALVERT v. JOHNSTON.

*Husband and
Wife—Separate
Use—
Alienation—
Trust.*

Settlement, in contemplation of marriage, of an annuity secured by bond to *N.*, (the intended wife), together with arrears then due, upon trust for her separate use, the receipts of *N.*, her appointees or assigns, to be good discharges for the annuity and all arrears, and all future and growing payments; and after her decease upon trust to pay all and singular the said trust moneys, or such of them as should be unpaid or undisposed of at the time of her decease, (in the events which happened) to her children

(nominatim), with provisions for their maintenance, education, and advancement.

Subsequently, the annuity being in arrear to an amount exceeding 3000*l.*, *N.* and her trustee released the annuity and all arrears and future payments, and in consideration of such release the obligor conveyed certain hereditaments to trustees upon trust to sell, and out of the proceeds to pay 3000*l.* to *N.*, her executors or administrators, and the surplus to himself, *N.* being a party to such conveyance.

Held, that upon *N.*'s death the 3000*l.* passed to her husband, and was not impressed with any trust for the benefit of her children.

A SPECIAL CASE.—By an indenture, dated 1819, and by a bond of even date, an annuity of 550*l.* for the life of *Nannette Johnston*, payable quarterly, with a proportionate part thereof up to the day of her decease, was granted by a *Mr. Drummond* and secured to trustees upon trust to pay the same to *Nannette* for her sole and separate use, and as to any proportion thereof which should be due and payable at the time of her decease, and up to the time of her decease, upon trust to pay the same to her executors and administrators.

By an indenture, dated 1831, being the settlement made in contemplation of the marriage of *Nannette* with *John Forster*, reciting the indenture of 1819, and that there was then in arrear and unpaid in respect of the annuity the sum of 475*l.*, it was declared that the said trustees should stand possessed of the said annuity, and all arrears then due and payable thereon, and all then future or growing payments thereof, upon trust, after the solemnisation of the marriage, to pay the same from time to time and at all times as and when the same should become due and payable, into the proper hands of *Nannette*, for her sole and separate use and benefit, and independent of the order, control, or engagement of *Forster*, her then intended husband, the receipts of *Nannette*, her appointees or assigns, alone to be good and effectual and sufficient discharges for the said annuity, and all arrears thereof, and all future and growing payments

thereof, or for so much thereof as should therein be acknowledged or expressed to be received. And from and after the decease of *Nannette*, as to all such arrears or other payments of the said annuity as should be then due and payable up to the day or time of her decease upon the trusts thereafter declared concerning the same. Those trusts were, to pay all and singular the said trust moneys, or such of them as should be unpaid or undisposed of at the time of her decease, as she should by will, notwithstanding her coverture, appoint; and in default of such appointment, upon trust to pay and assign the same to three children of *Nannette* [naming them] as tenants in common, to vest at twenty-one or marriage. The deed then contained provisions for survivorship and for the maintenance, education, and advancement of such children.

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CALVERT
v.
JOHNSTON.
Statement.

In February, 1847, the annuity was in arrear, the arrears considerably exceeding 3000*l.*; and the trustees of the annuity had obtained judgments against *Drummond*, which remained unsatisfied. Under these circumstances, by an indenture dated February, 1847, and made between *Davis* (the surviving trustee of the annuity) of the first part, *Forster* and *Nannette* his wife, of the second part, and *Drummond* of the third part, reciting that *Drummond* being desirous of having a release and discharge of and from the annuity, and all arrears and future payments thereof and securities for the same, had requested *Forster* and *Nannette* his wife, and *Davis*, to execute such release and discharge accordingly, which they had agreed to do on *Drummond* conveying certain fee farm rents and hereditaments mentioned in an indenture of even date (subject to a mortgage for 3000*l.*) to *Robins* and *Roper*, their heirs and assigns, upon the trusts in the indenture of even date declared, it was witnessed that *Davis*, at the request and by the direction of *Forster* and *Nannette* his wife, and also *Forster* and *Nannette* his wife did acquit, release, and for

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Statement.

ever discharge *Drummond*, his heirs, executors, administrators and assigns, their estates and effects, from the said annuity and all arrears and future payments thereof, and from the bond and judgments and all other securities for payment of the said annuity, arrears, and future payments.

By the indenture of even date, in pursuance of the said agreement and release, the said fee farm rents and hereditaments subject to the mortgage for 3000*l.* were appointed and conveyed by *Drummond* to the use of *Robins* and *Roper*, their heirs and assigns, upon trust to sell and to stand possessed of the moneys to arise from the sale, upon trust after satisfying the mortgage debt of 3000*l.* to procure satisfaction to be acknowledged on the respective records of all judgments entered up against *Drummond*, on the best terms that could reasonably be obtained; and in the next place, to pay to *Nannette*, her executors or administrators, the sum of 3000*l.*, and the surplus to *Drummond*, his executors, administrators, or assigns.

Nannette died in 1848, intestate. *Forster* died in 1850, largely indebted. A creditors' suit was instituted for administration of his estate; and upon the inquiries made under the decree in the suit it appeared that his assets, even if they included the 3000*l.* directed to be raised by the indenture of February, 1847, and the interest due thereon, would be insufficient to meet his liabilities.

The Plaintiff was a creditor of *Forster*, and he was also the sole legal personal representative as well of *Forster* as of *Nannette*. The principal Defendants were the children of *Nannette*.

The question for the opinion of the Court was, who was entitled to the 3000*l.* or the moneys to be produced by the sale of the fee farm rents representing the same.

Mr. *Willcock*, Q. C., and Mr. *Giffard*, for the Plaintiff, contended that the Plaintiff, as the personal representative of *Forster* and his late wife, was entitled to the moneys in question, and that the same were applicable to the payment of *Forster's* debts as part of his estate and assets.

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 CALVERT
 v.
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 Argument.

The settlement did not contain any clause restraining alienation; in fact, it was framed in the only mode which would enable *Nannette* to make a valid and effectual alienation as against her own claims in the event of her surviving her husband. A release merely, without consideration, would have been effectual to extinguish her right to all arrears; and if she could have released without consideration, it was competent to her to stipulate as she had done for a consideration; and upon her so doing, the 3000*l.* in question became her's absolutely, not impressed with any trust. Otherwise the construction of the settlement would amount to a restraint on anticipation.

Even if the 3000*l.* were to be looked upon as the savings of her separate estate, the right to that sum passed to her husband.

Mr. *Rolt*, Q. C., and Mr. *Cole*, for the Defendants, the children of *Nannette* :—

The true construction of the settlement is this:—If there are arrears, and such arrears are paid to the wife, she can receive and spend them. If there are arrears, and such arrears are not paid to her, they fall within the trusts for the children. It is as if she had said, "As to all such sums as shall become due in respect of the annuity and shall not be actually paid during my life, they shall belong to you." In that there would have been nothing illegal.

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 v.
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 Argument.

The VICE-CHANCELLOR.—I do not think there would. But, by the settlement, the receipts of the wife, "her appointees and assigns," are to be good discharges for the annuity and all arrears, and all future and growing payments. The annuity, therefore, and arrears, and all future and growing payments were payable to the wife, her appointees and assigns. Now the trust under which you claim is restricted to "such of the said trust moneys as shall be unpaid *or undisposed of* at the time of her decease."

Mr. Rolt.—Then had she at the time of her death disposed of these arrears? Clearly not, except by substituting for them the 3000*l.* mentioned in the deed of 1847. The recitals in that deed contain nothing to indicate an intention to vary the trusts which the settlement impressed on the arrears in question; and where one fund is substituted for another, in which several parties have successive interests, the fund so substituted is not acquired for the exclusive benefit of any one of such parties, but is bound by all the trusts by which the original fund was affected: *James v. Dean* (a), *Giddings v. Giddings* (b).

But, in truth, it is understating the case to say, that what was done by the deeds of 1847 was merely a substituting of one fund for another. The real effect of those deeds was, to make the fee farm rents a security for so much of the arrears as was then due. And the children are now entitled to the benefit of that security.

It is a mistake to say, that the wife had an absolute interest. She had only a partial and qualified interest, her children also taking an interest—an interest, namely, to the extent of arrears not paid at the time of her death,

(a) 11 Ves. 395.

(b) 3 Russell, 241.

and to that extent there was, in effect, a restraint on anticipation.

The case is of the utmost importance to the children, who, if the Plaintiff succeeds, will take no part of the fund, the whole being required to satisfy the husband's creditors.

Mr. *Bird* appeared for the Defendants *Robins* and *Roper*, the trustees of the fee farm rents.

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v.
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—
Argument.

The VICE-CHANCELLOR SIR W. PAGE WOOD (without calling for a reply):—

Judgment.
—

This case is, no doubt, one of great importance to the children; but upon the face of the deeds it is impossible for me to hold, that they are entitled to any part of the fund in question.

The settlement contains a recital, that there was then in arrear and unpaid in respect of the annuity a sum of 475*l.*; and then it declares, that the trustees are to stand possessed of the said annuity, and all arrears then due and payable thereon, and all then future or growing payments thereof, upon trust to pay the same from time to time as and when they shall become due and payable to the wife, for her sole and separate use—every sum, therefore, whether paid or unpaid, is to be held upon those trusts—and the receipts of the wife, *her appointees and assigns*, are to be good discharges—therefore, if any sums should not be paid to her, the receipt of her appointees or assigns would be good discharges for such sums; and then the settlement proceeds to declare that, from and after the decease of the wife, as to all such arrears or other payments of the said

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Judgment.

annuity as should be then due and payable up to the day or time of her decease, they are to be held upon the trusts thereafter declared concerning the same, those trusts being "to pay all and singular the trust moneys or such of them as should be *unpaid or undisposed of* at the time of her decease," as she should by will appoint, and in default of such appointment to the children.

Mr. *Rolt* says, that the words "unpaid or undisposed of" are not to have the effect of enlarging the previous trust; but by the previous trust, or rather by the receipt clause, it appears that the parties to whom the annuity and arrears were payable were not only *Nannette* herself, but her appointees and assigns. Consequently, by holding these arrears to have been effectually disposed of by the deeds of 1847, I am not at all enlarging the operation of the previous trust.

It is true that the parties might have anticipated that considerable sums would become due and in arrear in respect of the annuity, and might have stipulated by the settlement, had they been so disposed, that, as to such sums the wife should not have the power of appointing or assigning them; and had they so stipulated, then, of course, she would have been restrained from alienation. But this they have not thought fit to do. On the contrary, the settlement has reserved to the wife a power to appoint and assign—a power to dispose of the annuity and all arrears and all future and growing payments, and the trust under which the children claim is restricted to so much as should be "unpaid or undisposed of at the time of her decease."

The only question, therefore, is, whether she has disposed of it. Now as to the 3000*l.*, she could of course dispose of that by an assignment to a stranger, as well as by spending it herself; and such an assignment would have been per-

fectly good: or she might say, as in effect she has said, to the parties by whom the annuity was payable, "You owe me 3000*l*., I will give you a receipt for it, and will then lend it to you on mortgage." And such a transaction would have been good, not only in form, but in substance.

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v.
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Judgment.

Mr. *Rolt* says, that she never intended that there should be any change in the trusts with which the original fund was impressed; and he would argue, that the case is like that of a mortgage of a wife's lands, reserving the equity of redemption to the husband and his heirs, where the Court holds, that the wife or her heirs should redeem, and not the heir of the husband, the equity of redemption going according to the right, and not according to the form in which it is reserved. But in this case the trustee of the annuity joins in the conveyance of 1847, and the wife by that deed directs the 3000*l*. to be paid to herself.

Upon the deeds before me I cannot conclude that the lady meant that to be reserved for others which she has expressly reserved to herself; and I must therefore declare that the Plaintiff is entitled to the 3000*l*.

1857.

V. C. Wood.

April 23 &
May 6.Lords Justices
Nov. 5th.

YEM v. EDWARDS.

JOHN YEM, at the date of his will, was in possession as owner of 2 a., 3 r., 31 p. of land, parts of the *Forest of Dean*, in the county of *Gloucester*, being inclosed encroachments made from the *Forest*.

Forest of Dean
—1 & 2 Vict.

c. 42.—*Con-*
struction—
Trustee and
Cestui que
Trust—Estate
for Life—
Remainderman
—Rights of the
Crown—Pur-
presture—
Encroachment.

The Act 1 and 2 Vict. c. 42, for confirming the titles to and granting leases of encroachments in the *Forest of Dean*, was not intended to affect equities to which the property might be subject in the hands of those who, at the passing of the

Act, were the holders of such encroachments, or the rights of parties claiming in remainder expectant upon the determination of their estates.

Therefore, where it appeared that a party, who was holder and in possession of an encroachment at the passing of the Act, and, as such, had obtained a conveyance in fee under the 8th section, was so in possession under a devise to her for her life only, with remainders over:—*Held*, that she had acquired the fee not only for her own benefit, but also for the benefit of those in remainder; and that the latter were entitled to call upon her devisees for a conveyance of the fee.

The 12th section of the Act explained. It was intended to provide for disputes between parties claiming adversely the legal right (speaking without regard to the Crown's title) to be in possession and treated as holders. It has no reference to the case of parties claiming as equitably interested, or as entitled in remainder.

The law, as it then stood in reference to such encroachments, was regulated by an Act of Parliament of the 20th year of King *Charles the Second* (a), intituled "An Act for the Increase and Preservation of Timber within the *Forest of Dean*," by which it was enacted, that, to the end the said forest and premises might be perpetually reserved and estated in the Crown for public use, and might not be granted or disposed to any private use or benefit. In case any person or persons should presume to take, or should obtain, any gift, grant, estate, or interest of or in the enclosures or wastes of the said *Forest*, every such gift, grant, estate, and interest should *ipso facto* be null and void, and the person or persons so taking or obtaining the same should be, and was, and were thereby made and declared utterly disabled and incapable to have, hold, or enjoy any such gift, grant, estate, or interest.

John Yem, by his will, in 1824, devised the messuage and land of which he was so in possession to his wife *Benedicta* for her life, with remainder to the Plaintiffs in fee. He died in the same year.

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 YEM
 v.
 EDWARDS.
 —
Statement.

In the year 1831, an Act was passed for ascertaining the boundaries of the *Forest* and for other purposes (a), under which a commission was issued to certain commissioners, with authority, amongst other matters, to inquire of the purprestures, encroachments, and trespasses on the soil of the Crown within the boundaries of the *Forest*.

The commissioners caused plans to be prepared and annexed to their second report, dated 1834, in which encroachments made before the year 1787 were coloured red; those made between 1787 and 1812 were coloured blue; and those made since 1812 were coloured yellow. In these plans parts of the encroachments of which *John Yem* was in possession in 1824, were coloured blue, and the rest were coloured red. *Benedicta Yem* was named in the appendix to the report as the holder of both portions. .

By the Act 1 & 2 Vict. c. 42, s. 4, it was enacted, that, as regards the encroachments coloured blue in the plans, the commissioners for the time being of her Majesty's Woods and Forests, or any two of them, should, on the application of the persons respectively claiming to be entitled thereto, grant leases of the said several encroachments to the persons whose names were mentioned in the references to the plans annexed to the report as the holders thereof, or the persons claiming under them or otherwise; such leases to be granted to such persons respectively, and their respective heirs and assigns, for the lives of such three persons as

(a) 1 & 2 Will. 4, c. 12.

1857.
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Statement.

should be named by the respective possessors of such encroachments, and at such rents as the Commissioners of Woods and Forests should think fit, not exceeding two shillings per acre, which leases might be renewable as the commissioners should think fit.

By the 8th section of the same Act it was enacted, that, as regards the encroachments coloured blue or yellow, it should be lawful for any person entitled, in the opinion of the Commissioners of Woods and Forests, to have a lease thereof granted under the Act, at any time within ten years from the passing of the Act, to purchase the fee simple of such encroachments at a price, not exceeding twenty-five years purchase on the rent, which, in the opinion of the commissioners, ought to be reserved in any lease proposed to be granted; and thereupon the same encroachments should be conveyed by any two of such commissioners to the person entitled to the same, in such manner and form as the commissioners should think fit.

After the passing of the Act 1 & 2 Vict. c. 42, *Benedicta Yem* obtained from the Commissioners of Woods and Forests a conveyance in fee simple of such parts of the encroachments, of which her husband was formerly in possession, as were coloured blue, in consideration of certain small payments by her, amounting in the whole to somewhat less than 4*l*.

By her will, in 1856, *Benedicta* devised all her real estate to the Defendants *Edwards* and *Cooper*. She died in the same year.

The Defendants having brought actions of ejectment against the Plaintiffs to recover such parts of the said encroachments as were coloured blue on the plans, the Plaintiffs filed their bill for an injunction to stay the pro-

ceedings in ejectment, and praying that the Defendants might be decreed to convey to them, or as they might direct, the encroachments comprised in the deeds poll, and thereby expressed to be conveyed to *Benedicta Yem*, and to deliver up the deeds relating thereto.

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YEM
v.
EDWARDS.
Argument.

Mr. *Jessel* now moved for a decree as prayed by the bill.

He contended that the object of the Act 1 & 2 Vict. c. 42, was to give a parliamentary title to all holders of encroachments like those in question, upon their complying with the provisions of the Act; but it formed no part of the scope of the Act to disturb existing equities between such holders and third persons. Here the grant in fee simple had been obtained by the widow on account of her possession as tenant for life under her husband's will; and the grant, being a benefit derived from the possession, enured to the reversioner, according to the ordinary rule in equity, that where trustees, mortgagees, and persons interested obtain a renewal of a lease, the new lease is subject to the trusts of the old lease: *Rawe v. Chichester* (a), *James v. Dean* (b), *Eyre v. Dolphin* (c).

He cited also *Doe v. Morris* (d).

Mr. *Rolt*, Q. C., and Mr. *Southgate* for the Defendants, contended that they were entitled to the property freed from any estates or interests which the testator might have attempted to create.

The 12th section(e) of the Act had provided that any

(a) Amb. 719.

(b) 11 Ves. 392.

(c) 2 B. & B. 290, 298, 299.

(d) 2 Bing. N. C. 189.

(e) Set out below, p. 574.

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 —
Argument.

dispute as to the right to a lease or conveyance should be referred to the verderers of the forest, that such verderers should determine who, in their opinion, were best entitled to have such lease or conveyance granted, and that their decision should be final. The Plaintiffs ought to have settled their dispute in that way; and not having done so they were now too late, or at any rate this Court had no jurisdiction. The question was one simply of construction upon the words of the Act, and the rule of equity on which the Plaintiffs relied was inapplicable.

Mr. *Jessel* replied.

The VICE-CHANCELLOR reserved judgment.

May 6th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The property in the *Forest of Dean* which is in question in this cause, was held by *John Yem*, the testator, through whom the Plaintiffs claim, and had been acquired by him, as far as such property could be acquired, by encroachments on the forest. It appears that numerous persons had made like encroachments, all of which were by an Act passed in the time of *Charles the Second*(a) absolutely voidable, if not actually void, if they could be proved to have been made since the passing of the Act of *Charles the Second*. These encroachments being very numerous, and the date of them probably in many instances uncertain, a commission was issued by the Crown to certain commissioners, who made their first report in 1832, and their second report in 1834, the object of the inquiry being to ascertain what was right and proper to be done with reference to the several en-

(a) 20 Car. 2, c. 3.

encroachments which had been so made, notwithstanding the statute of *Charles the Second*.

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The conclusion to which the commissioners came is recited in the Act of Parliament to which I am about to refer, the 1 & 2 Vict. c. 42, and in effect was this: that there were certain encroachments which were made of an ancient date, and that they were so ancient that there was a difficulty, in some cases, in deciding whether they had or had not been made before the time of *Charles the Second*, and if they had been made since the time of *Charles the Second*, they had been so long suffered, that, in the opinion of the commissioners, it was reasonable that the rights of property should be considered as having been acquired in that particular class of incroachments; and they describe them in a map, and mark them red. All the encroachments so coloured red were old encroachments, which had been taken in before the year 1787. At that period they stopped with reference to these old inclosures, and they recommended to the Crown, as appears by the Act of Parliament which I am now about to refer to, that those particular inclosures should be deemed to be the actual property of the persons who were the apparent owners of them. As to certain other encroachments which had been made between the year 1787 and the year 1812, which they designated on the map and coloured blue, they were of opinion that another course should be taken, namely, that leases for lives should be granted "to their present possessors," upon which words I must comment presently, at very low rents, and they should have the option within a limited time of purchasing these rents for a small payment of so many years purchase, amounting to very small payments as regarded the value of the land in question, and thereby if they thought fit they might acquire the fee simple in those lands. Then as to certain others which are not now in question in this cause, coloured yellow, encroachments since

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1812, they recommended a different course, not giving so complete a title as in the other cases.

I will first look to the report of the commissioners as it is recited in the Act of Parliament. I have no doubt in my own mind that I am entitled under this recital, and under this Act, to look to the whole report of the commissioners; but I look at it, in the first instance, as contained in the Act of Parliament, and I do not think, looking at the whole report, that it makes any substantial difference; the only difference being this, that you see by the report that the quantities of land were very small,—in many cases, a few perches only, and in other cases rarely amounting to more than an acre or two,—and extremely numerous, so that the class of persons to be dealt with were persons having very small tenements, and were very many in number.

The Act of the 1 & 2 Vict. c. 42, recites in the first place the Act of *Charles the Second*, which declares all encroachments *ipso facto* void. It then recites, that, under a certain Act of the 1 & 2 Will. 4, c. 12, the commission to which I have referred had been appointed to inquire into and distinguish the boundaries of the *Forest of Dean*, and of the lands of His then Majesty's subjects within the same, and to inquire of the purprestures, encroachments, and trespasses on the soil of the Crown within the boundaries of the forest. Then it proceeds to recite that the commissioners had made their inquiries, "and by their second report, dated the 1st of May, 1834, and which report is stated by them to relate to the boundaries of the *Forest of Dean*, and of the lands of Her Majesty's subjects within the same, and the rights and interests of persons occupying or claiming to be interested in lands or tenements within the bounds of the said forest, the origin or alleged origin of such rights and interests, and also the dates, value, and other particulars of all other purprestures,

encroachments, and trespasses in and upon the soil of Her Majesty within the said forest, after stating, amongst other things in the said report, that the said commissioners had confined their attention to encroachments in the said forest properly so called, and that they had found it necessary to have maps prepared, in which the encroachments described as such in a certain map made in the year 1787, in pursuance of the report of certain commissioners, should be laid down distinct from those of a more modern date; and also stating, that, in the maps so prepared under the direction of the said commissioners whose report is in recital, (and which maps are annexed to the said report), the old encroachments were coloured red, those which were taken in between the years 1787 and 1812 blue, and those inclosed since the year 1812 yellow; that every facility, by repeated notices given generally and individually, had been afforded to the several parties in possession of lands coloured blue and yellow, to appeal against the colour by which their encroachments were distinguished, and nearly all of them appeared before the said commissioners in person or by proxy; that the few who did not so appear received further notice of the day appointed for final adjudication; that all red encroachments were included in one class, because the said commissioners could not presume that any of them were inclosed before the said Act of the 20th year of king *Charles the Second*; but, the Crown, having had its attention called by the proceedings of the commissioners appointed in 1787, as in the report is mentioned, to the existence of these red encroachments, and not having taken any effectual steps to assert its right, ought not to disturb the possession; the commissioners by their report, therefore, recommended that the lands coloured red in the said plans (amounting to 1510 acres, 2 roods, and 32 perches, should be declared to be freehold of inheritance, subject, however, to a condition that no additional dwelling-houses should be erected thereon without the license of the Crown, to be registered in the

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Court of Attachments; and that the lands coloured blue in the plans, containing 573 acres and 10 and a half perches, should be granted to their present possessors for three lives, not renewable except at the pleasure of the Crown; and that the said possessors should respectively pay rents varying from one shilling to two shillings per acre."

The Act then recites, that the commissioners further make a recommendation as to the possessors of land coloured yellow, who were very few in number—the blue contained 573 acres, and the yellow only 24 acres, 2 roods, 9½ perches; and that they mention also certain other lands which they have coloured green, and which they recommend should be treated in the same way as the red lands there mentioned.

That being recited in the Act by way of preamble, there follows this concluding passage: "And whereas the said Second Report of the said Commissioners of Enquiry was presented to the Commons House of Parliament in the year 1835, and was soon afterwards printed by order of the said House; and whereas it is expedient to make provision for the carrying into effect the recommendations contained in the said Report in manner after mentioned, subject to such modifications or alterations as are after contained, and also to make provision for preventing any further encroachments on the wastes of the said forest." And then the Legislature proceed to enact what follows. They do not say they adopt the entire report as it stands, which might have made it doubtful how far any particular value could be attached to the opinion of the commissioners in the report, inasmuch as they recommend it to be done with certain modifications, but they proceed to enact, after certain formal clauses as to how the copies of plans are to be open to inspection and to be evidence, that all encroachments coloured red and green shall be held by the possessors as if the Act of *Charles the Second* had never been passed, and also as if they had been

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occupied more than sixty years before the passing of this Act (a), so as to come within the benefit of the nullum tempus Act. The red and green property is treated as actual property and subject to all the incidents of property which might have accrued to an actual holder. Then, as to the encroachments marked blue, the encroachments in question in this cause, they enact "that the Commissioners, for the time being, of Woods and Forests, shall, upon the application of the persons respectively claiming to be entitled thereto, grant leases of the said several encroachments to the persons whose names are mentioned (in the references to the plans annexed to or which accompanied the said report) as the holders thereof, or the persons claiming under them or otherwise:"—(That passage would clearly entitle me to look into the report to see who are the persons described as holders, and to see anything that might be stated with reference to such holding)—"such leases to be granted to such persons respectively, and their respective heirs or assigns, for the lives of such three persons as shall be named by the respective possessors of such encroachments or the lives and life of the survivors or survivor, at such rents as the Commissioners of Woods and Forests should think proper, not exceeding the rate of 2s. per acre" (b). The 5th section enacts, that it shall be lawful to renew those leases on the dropping of the lives. The 7th section directs certain covenants to be inserted in the leases; and then the 8th enacts, "That, as regards the encroachments coloured blue or yellow, it shall be lawful for any person to whom any lease thereof may have been granted under this Act, or who, in the opinion of the Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, shall be entitled to have a lease thereof granted under this Act, at any time within ten years from the passing of this Act, to purchase the fee simple of such encroachments at a price

(a) 1 & 2 Vict. c. 42, s. 3.

(b) Id. s. 4.

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not exceeding twenty-five years' purchase." Then there is a direction how the moneys are to be applied.

The only other section that I think it necessary to notice is that which limits the period for applying for leases. The 10th section enacts, that, if leases are not applied for within five years, the holders may be summarily evicted; with a provision with respect to any person who shall be under twenty-one years of age, or under any other disability at the time when the lease ought to be applied for.

There is a further section to which I was specially referred, viz. section 12, by which it is enacted, "that, if any dispute shall arise between two or more persons as to their right to have a lease or conveyance of any of the aforesaid encroachments granted to them in pursuance of this Act, then and in case such dispute shall be notified in writing to the said Commissioners for the time being of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, within twelve calendar months from the passing of this Act, but not otherwise, it shall and may be lawful for the said Commissioners to refer the matter in dispute to the verderers of the said forest, to inquire and determine who, in the opinion of the said verderers, are best entitled to have such lease or conveyance granted; and the report in writing of the said verderers, or any two of them, made to the said Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, shall be conclusive as to the right of the parties entitled."

The question that arises upon this Act of Parliament is of this character: *Benedicta Yem*, at the time of the report of the commissioners, was tenant for life, as far as one may treat the interest of the testator in the encroachments occupied by him as being an interest in him—which of course it was not until sanctioned by Act of Parliament,—

but he, dealing with it as an interest absolutely vested in him, disposes of it by will, and gives it to his wife *Benedicta* for life, with remainder to his sons. *Benedicta* being named as the holder in the report of the commissioners, applied, pursuant to the 4th section of the Act, to have a lease for three lives; and subsequently applied, under the 8th section of the Act, to purchase the property, and became the purchaser for a small sum almost nominal, and a conveyance was made to her accordingly. She then made her will, by which she purported to dispose of this property to the Defendants *Edwards* and *Cooper*, who are now bringing ejectment against the Plaintiffs, who were in possession at the time of *Benedicta's* decease. And the question is, how far the Plaintiffs, in consequence of the Act 1 & 2 Vict. c. 42, having established a title in their father, who at the time of making his will had no title, being an encroacher against the Crown, are now entitled to rely upon the rule, which was not denied in argument to be the recognised rule in this Court, that tenants for life acquiring any interest in property in respect of that possession which they hold as tenants for life must be taken to acquire it for the benefit of themselves during their life, and for the benefit of the estate as regards those in remainder. That rule is indisputable with reference to any renewable leases, or the like, and the difficulty arising in this case is on the particular frame of the Act of Parliament.

Looking to the provisions of the Act, it is clear, that, as regards the encroachments coloured red, no question of this kind could arise, for the Legislature at once and distinctly said, that the whole of that land should be dealt with exactly as if it had always been fee simple, as if the statute of *Charles* had not existed, and as if possession had been sixty years adverse to the Crown. It is clear, therefore, that, in dealing with that property, the Legislature had not the

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least intention of in any way altering rights which might have been acquired in it; but, on the contrary, meant to confirm them to their fullest extent.

The question is, what was the intention of the Legislature as regards the encroachments coloured blue? And I have come to a clear conclusion, that, as regards such encroachments, the intention of the Legislature was not in any way to deal with any equitable interests in a case like the present. It is plain, that the whole import of the Act was to take care that persons who had made encroachments since the year 1787 should not be entitled, like those who had made earlier encroachments, to the benefits of absolute ownership. With the view, probably, of preventing further encroachments being made, the Legislature says: "As regards the later encroachments, it is high time to put a stop to them, and we will take care that the parties shall pay something, however nominal, which will recognise the right of the Crown, and which will be a clear indication that we do not intend this course of encroachments to continue, or to be sanctioned or ratified. As regards such of these later encroachments, therefore, as were made before 1812 (that is, more than twenty-five years before the passing of the Act), we will ratify and sanction them, but solely on the terms of certain payments being made, which shall recognise the right of the Crown, and indicate the intentions of the Legislature on the subject."

In any other view of the Act, the difficulty is extreme. To assume that the Legislature intended, as it clearly did intend, to ratify the species of possession obtained by means of encroachments, to recognise and to ratify the rights of the parties as rights of property, and yet to let the beneficial enjoyment depend upon the mere accident of who happened to be in possession of the property, is so

unreasonable a construction of the Act, that this Court ought not to adopt it.

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For instance, take the case of a mortgage of property of this description—which, in truth, was no property at all until the Act was passed, the Statute of *Charles the Second* preventing it from being so—suppose the mortgage to have been made before the finding of the commissioners as to who were the holders, and the mortgagor to be in possession at the passing of the Act—Is he, by reason of the mere accident of his happening to be the possessor at the time of the passing of the Act, to be at liberty, by obtaining a lease and conveyance under the 4th and 8th sections of the Act, to hold the fee simple of the property discharged from the mortgage? That, I apprehend, could never be intended. The words of the Act are: “The holders or those claiming under them.” And although it is true, that, if the mortgage had been made after the report of the commissioners, it might possibly be held that the mortgagee could come in as one of those claiming under the party named as “the holder” by the commissioners, I am supposing the case of a mortgage anterior to the finding of the commissioners as to who were the holders; and it seems to me impossible that the Legislature could have intended, in such a case, to vest the property in the mortgagor entirely free from the mortgage. Or again, suppose the mortgagee to have been in possession, it is equally impossible to suppose that the Legislature contemplated that the mortgagee was to hold the property in fee simple discharged from all equity of redemption on the part of the proprietor.

Or, to take the case of a guardian of infants who might happen to be in possession of property of this description, and to be described, therefore, as the “holder,” in the report of the commissioners.—The Act provides that the grant

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is to be made to the holder, and he, therefore, would be entitled to a grant of the property in fee simple. But is he, by virtue of such a grant, to hold the fee simple of the property for his own benefit, and freed and discharged from all the trusts on which he held it for the benefit of the infants?

None of these cases are provided for by the Act; and it is clear, from that circumstance, that the Legislature never intended, by the Act, to disturb existing equities, or to do more than to give a merely legal title to the party who at the time of the passing of the Act might happen to be the holder.

As regards the 12th section of the Act, it is clear, if I look merely to the Act itself, and the conclusion is still stronger if I refer to the report, that it contemplates, not disputes and difficulties like the present, but disputes between adverse claimants inter se. Assuming the general scope of the Act to have been what I have held it to be, viz. that the title of the holders of the encroachments in question should be dealt with as a title ratified by the Act, and that such ratification should extend back to the whole period of the possession, it appears to me, that, by the 12th section of the Act, the Legislature intended to provide for the case of persons, who, upon the assumption that the property was such as could properly be held as against the Crown, might have adverse rights as between themselves to be the holders of the property. If it was property which, but for the statute of *Charles the Second*, would have been the property and in the possession of a particular person, and he had been ejected or disturbed in his possession, or so treated, that, at the time of the finding of the commissioners as to who were the holders, he was unlawfully out of possession of the property, in such a case, the 12th section provides that the dispute between him and

those who are unlawfully in possession of the property should be determined by the verderers. But that question could not arise between a tenant for life and a tenant in remainder. The tenant for life would be the proper person to have the grant made to him; and it is clear that questions arising between him and those in remainder are not within the scope of the 12th section of the Act.

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That this was the intention of the Legislature is sufficiently plain from the Act itself, but it is yet more manifest from the report of the commissioners. I do not think it necessary to call in aid the report; but, if it were necessary, there is a passage at the end of the second report which clearly indicates the view of the Legislature. At the end of their second report the commissioners say this:—"Having inserted in the appendix of No. 3 the name of the person only who is now found in actual possession of each encroachment, *without inquiring into the title as between him and any other person,*" (that clearly shews they were contemplating it as property capable of being legally held, as if the Act of *Charles the Second* were out of the question, for of course there could be no "title," assuming that by the operation of that Act the possession was simply wrongful,) "and taking into consideration the difficulty to which such inquiry between party and party is liable by the operation of the statute 20 Car. 2, c. 3, we think that a clause should be framed to relieve parties from this difficulty, and to enable them to try their respective rights by action within a short limited period from the passing of the Act."

It is manifest that what the Commissioners mean is this:—"If the Crown accedes to our view, and allows the parties who are in possession of the land marked blue to acquire a title in fee simple, we say we have not inquired into the question whether any person so in possession were lawfully

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in possession as between him and other persons,—‘lawfully,’ that is, assuming their acquired title to be ‘lawful,’—but we think that any person has a right to try that description of case, and that the Legislature, when it is converting the title of the possessor into a legal title, ought to provide the means for finally determining in such a case what are the legal rights.” But that cannot apply as between trustee and cestui que trust, or between tenant for life and those in remainder. And it is obvious, that, to cases of the latter description, the Act has no reference.

There is some analogy to this case in a class of cases which have been occasionally before the Court, and of which I remember one before Vice-Chancellor *Wigram* (a), where there was a trustee and cestui que trust of charity land, and the title was bad for want of enrolment of the deeds. There the Court would not allow the Statute of Mortmain to be set up between trustee and cestui que trust; but said, it would deal with such parties as if, as between them, the land had been lawfully held. That is exactly how, I think, the commissioners intended to deal with these encroachments. They say, “with regard to the rights of the Crown, they must be asserted in this particular manner. With regard to the individuals in possession of encroachments, we think they will have rights also when the Crown shall have once chosen to recognise them. They will then have rights *inter se*, which ought to be provided for.” The Legislature provides them with the means of trying those adverse rights within a short period and by a cheap form of proceeding. But the Legislature never intended to deal with anything more than the legal title as between all parties. It left all equities to be administered after the legal title had been acquired.

(a) *Attorney-General v. Ward*, 6 Hare, 477, 483, 484.

I think, therefore, that I am bound to hold, that, upon payment to the Defendants by the Plaintiffs of the small sums paid by *Benedicta Yem*, the Plaintiffs are entitled to the relief prayed by the bill. Interest will not be payable, because it was her duty to keep down the interest during her life.

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I do not think it is a case for costs. It is a question of some nicety. The Defendants brought their actions with a reasonable colour of title.

Mr. *Jessel* would not press for costs.

RESTRAIN actions in ejectment. And, on payment by Plaintiffs to Defendants of the small sums paid by *Benedicta Yem* to the Commissioners for the purchase of the fee simple, Decree Defendants to convey the pieces of land coloured blue to Plaintiffs, or as they shall direct.

Minute of
Decree.

This decree was affirmed on appeal by the Lords Justices, who dismissed the appeal with costs.

Lords Justices
Nov. 5th.

DELFE v. DELAMOTTE.

Aug. 5th.

THIS was a motion for an injunction restraining the Defendants from printing, publishing, and selling any copies or copy of a third or any subsequent edition of the Plaintiff's book, called "The Practice of Photography."

Copyright—
5 & 6 Vict.
c. 45 ss. 23
& 26—Right
to account—
Profits—
Gross Pro-
ceeds.

The Plaintiff had established his title at law, and it was

tion of the Copyright Act (5 & 6 Vict. c. 45) does not give to the registered proprietor of a copyright in any book a right in this Court to more than the usual account of the net profits of all copies of the book. He has no right in this Court to an account of the gross proceeds.

The 23rd sec-

To recover the pirated copies, he must proceed at law

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now arranged that the motion should be considered as a motion for decree.

The prayer of the bill was for an injunction as above, and that the Defendants might be decreed to account for and pay to the Plaintiff all sums of money received by them from the sales of any copies of the said 3rd edition, or otherwise all such gains and profits as had accrued or been received by the Defendants, by the printing, publishing, and sale of the said 3rd edition; and to deliver up all copies of that edition remaining unsold.

Argument.

Mr. Rolt, Q. C., and Mr. Welford, for the Plaintiff

The Plaintiff having established his title at law, the only question now raised by the Defendants is, whether the Plaintiff is entitled to be paid all sums received by the Defendants from the sale of the Plaintiff's work, or only the profits which they have made by such sale.

The 23rd section of the Copyright Act (5 & 6 Vict. c. 45), entitles the Plaintiff to the gross receipts. By that section of the Act it is enacted, "that all copies of any book wherein there shall be copyright, and of which entry shall have been made in the registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright and who shall be registered as such; and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover." This section makes the

books the *property* of the author for all purposes. The Defendants must deliver up all the unsold copies, and are not entitled to any allowance in respect of them; and as to those sold, they cannot be in a better position from the fact of sale, but the proceeds must be considered as arising from the sale of the Plaintiff's property. The Plaintiff, therefore, is entitled to the whole of such proceeds.

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Mr. *Cracknall* for the Defendants.—The question is quite new. Under the former Acts, and according to the course of the Court independent of this Act, the Plaintiff is entitled, as in partnership cases, to the net profits only, after making to the Defendants all just allowances: *Kelly v. Hooper* (a), *Colburn v. Simms* (b). The claim of the Plaintiff is founded entirely on the statute, independent of which the Plaintiff has no right to the Defendants' books: *Colburn v. Simms* (c). The Court will leave the Plaintiff to his remedy at law, the section being in the nature of a penalty, and will not assist him to establish an inequitable demand. In many cases, as in suits for tithes, the Court compels a Plaintiff to waive his statutory penal rights as a condition for relief.

Besides, the Plaintiff is barred by time under the 26th section of this Act, which provides, that all actions, suits, bills, indictments, or informations for any offence that shall be committed against the Act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect. This is a "suit," so far as regards what is now contended for by the Plaintiff, given only by and depending on this Act, for "an offence committed against this Act;" and the printing having taken place more than twelve calendar months ago, an action would be too late; and this Court, therefore, will not give relief.

(a) 1 Y. & Coll. C. C. 197.

(b) 2 Hare, 543.

(c) Ib.

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The VICE-CHANCELLOR (to Mr. *Rolt*, without hearing further the defence).—I do not see why, sitting here as a Judge in equity, I should give you more than an account of profits. If you want more your remedy is at law.

Mr. *Rolt*, Q. C., in reply.—The 23rd section, on which we rely, speaks of “suits,” and clearly contemplates proceedings in this Court, and this Court is bound to exercise its jurisdiction under the Act. The Act makes the books themselves the property of the Plaintiff.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This is not a question of right of property. The question as to right of property is decided in favour of the Plaintiff, and the decree will give him an account and payment of net profits. But if the Plaintiff wants more than that, his remedy, if he has not lost it by lapse of time, is at law.

I observe, that the old form of the order for delivery up of the pirated copies of a book ran thus—“that the Defendant deliver up such copies *to be destroyed*,”—so that the Plaintiff would have no benefit from such an order.

Minute of
Decree.

DECREE perpetual injunction as prayed. Order Defendants to deliver to the Plaintiff all copies of the Third Edition of the Plaintiff's Book in the pleadings mentioned. The Defendants offering to pay 25*l.* to the Plaintiff in full of all claims for profit upon the sale of the said edition, if the Plaintiff accepts such offer—Order Defendants to pay the same accordingly ; but if the Plaintiff does not accept such offer, then order the usual accounts to be taken of the gains and profits received by the Defendants from the Third Edition of the Plaintiff's book.

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HALL v. MAY.

July 30th &
Aug. 4th.

JAMES DOBB, by his will, devised real estate to *Joseph Hall* and two other persons, their heirs and assigns, for ever, upon trust that they and the survivors and survivor of them, his heirs *and assigns*, did and should, at such time or times as they should think most advisable, make sale and absolutely dispose of the same, and should sign and give a receipt or receipts for the purchase money, which receipt or receipts should effectually discharge such purchaser or purchasers from seeing to the application of the purchase money. The will contained a power for the trustees or the survivor of them to appoint new trustees, in the usual form.

Joseph Hall survived his co-trustees, and afterwards, by his will and a codicil thereto, gave all estates vested in him as a trustee, to *John Hall* and *James Hall*, their heirs and assigns.

After his death, *John Hall* and *James Hall* contracted with the Defendant for a sale of the premises.

The purchaser objected to the title in Chambers, submitting that the vendors had not been duly constituted trustees under the will of *James Dobb*, and could not sell and give a discharge for the purchase money.

The question being now adjourned into Court,

Mr. *Amphlett*, for the Plaintiffs, contended that the Plaintiffs were competent to sell and give a discharge for the purchase money. The trust created by the will of *James Dobb*

Trusts and Trustees—Surviving Trustee—Devise by, of Trust Estates—Vendor and Purchaser.

Devise upon trust that the trustees and the survivors and survivor of them, his heirs *and assigns*, should, at such time as they should think most advisable, sell, and give receipts, which should be good discharges; with a power for the trustees or the survivor to appoint new trustees, in the usual form. The surviving trustee devised his trust estates.

Held, that his devisees could make a good title; and *semble*, the word "*assigns*" would have been sufficient for this purpose, without the power to appoint new trustees.

Cooke v. Crawford (13 Sim. 91), *Tisley v. Wolstenholme* (7 Beav. 425), and other authorities on this subject discussed.

The doctrine of *Cooke v. Crawford* will not be extended.

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Argument.

was to be exercised by the "heirs *and assigns*" of the surviving trustee; and the case, therefore, was within the authority of *Titley v. Wolstenholme* (a).

Mr. C. Hall, for the Defendant, insisted that *Joseph Hall* had no power to appoint new trustees by his will. The Plaintiffs, therefore, had not been duly constituted trustees of the will of *James Dobb*, and, consequently, had no power to sell: *Cooke v. Crawford* (b).

Ockleston v. Heap (c), showed that the existence of the word "assigns" in the original trust did not affect the question.

Mr. Amphlett replied.

[In addition to the cases referred to in the judgment, *Macdonald v. Walker* (d) and the cases there collected, and *Saloway v. Strawbridge* (e), were also cited.]

The VICE-CHANCELLOR reserved judgment.

*Aug. 4th.**Judgment.*

VICE-CHANCELLOR SIR W. PAGE WOOD, after reading the trust for sale contained in the will, and observing that the will contained also a power to appoint new trustees, in the usual form, proceeded as follows:—

The question is, whether, under a will like the present, a title can be made by the devisees of the surviving trustee.

The principal case cited on the part of the purchaser was that of *Cooke v. Crawford* (b). On the part of the vendor, that of *Titley v. Wolstenholme* (a), was relied on; and looking through the various authorities to which I have been

(a) 7 M. Beav. 556. 425

(b) 13 Sim. 91.

(c) 1 De G. & Sm. 640.

(d) 14 Beav. 556.

(e) 1 K. & J. 371.

referred, I do not find any that carries *Cooke v. Crawford* further than that case went, or which disapproves of *Titley v. Wolstenholme*; and, it appears to me, that, both on principle and authority, the point is one so clear that the purchaser is not entitled to say any doubt exists upon it.

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Cooke v. Crawford, as Vice-Chancellor *Parker* pointed out in *Wilson v. Bennett*(a), was decided on this principle, that, where the trust is to be executed by the trustee and his heirs, the testator does not intend the trust to be separated from the estate; and of course if you were to allow an assign to execute the trust where the testator has not said that an assign is to execute it, you are brought into this difficulty, that either the heir is to execute the trust, and then the assign is to convey, or else you allow the assign to do that which the testator has said the heir alone shall do.

Whether that was the opinion before *Cooke v. Crawford* it is not material to inquire. It was, however, so far settled, that nobody could be compelled to take a title, where, there being a trust to be performed by the original trustee or his heirs, the title had to be made through the assigns of such trustee.

In none of the cases in which *Titley v. Wolstenholme* has been mentioned, do I see any mark of disapprobation of that decision. The cases have been different from *Titley v. Wolstenholme*, and in every case but one the word "assigns" was not mentioned. That was *Ockleston v. Heap* (b), before Vice-Chancellor *Knight Bruce*. There the circumstances were peculiar. The surviving, or rather the sole trustee, had devised the trust estates to two persons; and the bill was filed by parties beneficially interested in the trust property for the appointment of new trustees of the instrument by which the trust was created, and which contained

(a) 5 De G. & Sm. 475.

(b) 1 De G. & Sm. 640.

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no power for that purpose. One of the devisees objected to being removed, and *Titley v. Wolstenholme* was cited to shew that he was duly appointed a trustee. Vice-Chancellor *Knight Bruce* said, "What I should have done if *Titley v. Wolstenholme* had come before me I need not say, nor am I sure:" and he acquiesced in the view of those who desired to have new trustees in a case so circumstanced, where a devisee of a surviving or sole trustee insisted on acting in opposition to the wishes of his cestui que trust.

In the case of *Mortimer v. Ireland* (a), I find Lord *Cottenham* taking notice of the decision in *Titley v. Wolstenholme*. *Mortimer v. Ireland* was the common case of *Cooke v. Crawford*, a limitation to trustees, without mentioning assigns. Lord *Cottenham* takes the distinction, and he says, "The argument" (that the assigns could execute the trust) "amounts to this, that the executor of a trustee is of right a trustee—whether the property be real or personal is no matter. Suppose a man appoints a trustee of real and personal estate *simpliciter*, and nothing more, this cannot make his representative a trustee. The case before the Master of the Rolls," meaning *Titley v. Wolstenholme*, "was quite different, for there the Court proceeded on the intention manifested, that the trust should be performed by the assigns of the survivor." Lord *Cottenham* there recognises and does not intimate any doubt of that case; nor can I conceive any principle, where a person has said that his trustees or the survivor of them, his heirs and assigns, should perform the trust, on which this Court is to say that the devisees of the survivor shall not perform the trust.

The argument used in *Titley v. Wolstenholme*, and which was the only rational argument, was, if the surviving trustee

(a) 11 Jur. 721.

may assign by will, how can you say he is not to assign by an act inter vivos? And would it be right that the trustee should so assign and constitute a new trustee by such an assignment? In the case before me, I think the difficulty does not arise. It did arise in *Titley v. Wolstenholme*, where there was no power for the trustees or the survivor to appoint new trustees; and there the point was pressed on the Master of the Rolls, and it seems not unreasonably; but the Master of the Rolls said, that the reasons which forbade a surviving trustee making an assignment inter vivos, did not apply to an assignment by will, for it could not be assumed that the author of the trust placed any personal confidence in the heir of the survivor. And certainly it may well and reasonably be held, in a case like this, where the testator has expressly used the word "assigns," that, although a trustee cannot part with his trust by act inter vivos, still when the trust must depart from him by reason of death, he is at liberty by his will to make an assign to carry into effect that trust as well as to leave it to the heir. As the Master of the Rolls said, it is absurd to suppose that there is personal confidence in an heir who may be a lunatic, an infant, a bankrupt, or any number of married women. To suppose that the testator reposes confidence in that very uncertain personage, which he would be unwilling to repose in a person selected by the will of his last surviving trustee, would be irrational.

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Where, as here, there is a power for the original trustees, or the survivor of them, to appoint new trustees, the case is much stronger. There is no compulsion on the surviving trustee to appoint by act inter vivos; and in case he does not, the only mode in which he can transmit that trust which the testator has said shall be performed by the heirs or assigns of the survivor, if he wishes not to leave it to the uncertainty of who may be his heir, is, to do that which the testator has said in so many words may be

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done and to make his assign by his last will. He cannot do it in the mode pointed out by the testator, because he chooses to retain the trust up to his death, but he can say that after his death the trust shall devolve in a given course.

There is great reason to believe that the safety of many titles depends on not extending the doctrine of *Cooke v. Crawford*. Certainly I am not inclined to extend it in any way beyond the necessity of the case. No such necessity exists here. The case of *Titley v. Wolstenholme* has been recognised by many Judges without dispute; and it appears to me a perfectly good title can be made by the devisees of the surviving trustee.

Mr. *Amphlett*.—The purchaser will pay the costs of this summons.

The VICE-CHANCELLOR.—Yes, I suppose he ought to do so, as Lord *Eldon* said, “to make his title sure.”

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& 30th.

THE Rev. Rowland Hill, by his will, in 1831, after bequeathing certain sums for specific charities and other purposes, gave his residuary personal estate to four persons,

Charity—
Mortmain—
9 Geo. 2, c. 36
—Will—Deed
—Construction
—Costs.

The circumstance that trustees of a charity to which money is bequeathed may consistently with their trust apply the fund in a manner which would be illegal under stat. 9 Geo. 2, c. 36, is not, of itself, sufficient ground for withholding the fund. The question is whether they *must* so apply it.

If the Court sees that the trust can be duly performed without necessarily applying any part of the fund in an illegal manner, it will declare the trustees entitled, but with a further declaration in the case supposed above, to prevent the illegal application. With these declarations the Court will hand over the fund to the trustees.

Bequest to four persons upon trust, to pay the same to the treasurers of a charitable society. By an earlier deed the object of the society was declared to be to promulgate the Gospel by (inter alia) "opening and supporting Sunday-schools, by the erection or providing of places for religious worship, and by such other means as to the society should seem meet."

Held, that the bequest was good within the stat. 9 Geo. 2, c. 36, inasmuch as the deed recited that lands had been already purchased with the money of the society, and notwithstanding the deed contained a further recital that other lands might thereafter be conveyed for the purposes of the society; for the erections might be on the lands then already held in mortmain. But, having regard to the later recital, *Declared*, that the application of any part of the fund towards the purchasing of additional land by the charity would be illegal.

The preceding bequest was followed by a codicil, by which, in case any part or parts of testator's personal estate previously settled or bequeathed by him to charitable uses should by any statute or law then in being be considered not to have their full operation for the intents and purposes for which he had designed them, the testator bequeathed all such monies to the same four persons as joint tenants, free from any trust or condition whatever, expressed or implied.—*Held*, that, even if the bequest in the will had been void under the statute, the bequest in the codicil would have been valid; and that notwithstanding the survivor, by his counsel at the bar, professed that, having regard to the contents of the will and codicil, he should feel bound to hand over the fund to the charity.

In such a case it is impossible for the Court to intend any trust, unless it can convert the legatees into trustees, by proof of some communication between them and the testator, importing that he intended a trust, which they, in effect undertook, and by which, therefore, their consciences would be bound:—*Seemle*.

Lord Northington's decision in the *Attorney-General v. Tyndall*, (2 Eden, 207) that a gift over for charitable uses, in the event of a previous gift being void under the statute, must be taken as in fraud of the law, and intended to intimidate the heir or next of kin, and prevent their disputing the charity, and therefore void—*Disapproved*.

Lord Northington's other proposition in the same case, to the effect that the building on land already held in mortmain, inasmuch as it improves the estate, and renders it more valuable, is a transgression of the statute 9 Geo. 2, c. 36, has been overruled by a series of subsequent decisions.

Further observations on that case, and observations on the *Attorney-General v. Bowles*, (3 Atk. 806).

In a deed like the above, the Court would read the trust as a trust to promulgate, &c., by all or any of the means there specified.

In charity cases, where no improper point is raised on behalf of the next of kin, they are entitled to their costs as between solicitor and client.

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named *Wilson, Green, James, and Long*, upon trust to sell and convert into money and to stand possessed of the moneys to arise therefrom, upon trust, after payment of his debts, funeral and testamentary expenses, and the legacies and an annuity given by his will, to pay over the residue of the trust moneys unto the treasurer for the time being of the society or institution called, "The Village Itinerancy, or Evangelical Association for the Propagation of the Gospel," therein more particularly described, such residue to be appropriated for the pious and benevolent uses and purposes of that Association.

By a codicil, dated the 13th of February, 1833, the testator, after reciting that he had, by his will and by other methods, settled and disposed of some parts of his personal estate to charitable uses, declared that in case any part or parts of the same should by any statute or law then in being be considered not to have their full operation for the intents and purposes for which he had designed them, then and in such case he gave and bequeathed all such moneys, property, personal estate, and effects unto the said *Wilson, Green, James, and Long*, their executors, administrators, and assigns, absolutely and for ever, free from any trust or condition whatever, expressed or implied.

By a subsequent deed, dated the 16th of February in the same year, the testator attempted to dispose of a sum of 200*l.* Long Annuities, since converted into 3*l.* per cent. Consols, which, with the accumulations, were now standing in the names of the Plaintiffs, for certain charitable uses, for the benefit of *Surrey Chapel*. But the deed, not having been enrolled or executed as required by the stat. 9 Geo. 2, c. 36, and for other reasons, was void.

After the date of this deed, the testator made two other codicils to his will, which amounted in the opinion of the

Court to a republication of his will, and died in April, 1833. *Wilson* died in 1835, *James* and *Long* in 1845.

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It appeared that the constitution, nature, and object of the society called "The Village Itinerancy," were declared by a deed enrolled and dated 1811, by which, after reciting that various sums of money had been given and bequeathed by divers persons to and for the purposes of the society, and that divers freehold and leasehold estates had been purchased or acquired by and with the moneys of and belonging to the society, and that divers other sums of money might thereafter be given and bequeathed to or for the purposes of the society, and divers estates and other properties might also be thereafter conveyed and assigned to and for the purposes of the society; and that, for rendering effectual the donations, bequests, and conveyances which had then already been given, bequeathed, and made to and for the purposes of the society, and also for guiding and explaining the objects of future donations, bequests, and conveyances which had then already been given, bequeathed, and made to and for the purposes of the society, and also for guiding and explaining the objects of future donations, bequests, and conveyances to and for the purposes of the society, and that no doubt or litigation might arise with respect to the existence, objects, members, or officers of the society, it had been thought expedient to explain and declare the name, objects, and fundamental regulations of the society, to the intent that the moneys which had been or which might be given and bequeathed, and the freehold and leasehold estates and other properties which had been or might thereafter be acquired by and conveyed or assured to and for the purposes of the society, might not be unrecovered, unappropriated, nor misapplied. It was declared, First, That the name and title by which the society should thereafter be called should be that of "The Village Itinerancy, or Evangelical Association for the Pro-

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pagation of the Gospel" Secondly, That the object of the society had been and should be to promulgate the Gospel of our Lord and Saviour Jesus Christ as set forth in the doctrinal articles of the Church of England and in the book called "The Shorter Catechism of the Assembly of Divines who met at Westminster," according to the meaning then ascribed to the doctrinal articles and to the said catechism by Calvinists; and that such promulgation should be effected by opening and supporting Sunday-schools, by distributing bibles and religious books, by educating persons for the ministry of the word of God, by itinerant preaching, by the erection or providing of places for religious worship, and by such other suitable means as to the society or committee thereof, to be appointed as thereafter mentioned, should from time to time seem meet.

The bill prayed for a declaration as to the rights and interests of all parties in the funds standing in the names of the Plaintiffs, and for directions in what manner and for what purposes the same ought to be applied.

Argument.
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Mr. *Daniel*, Q. C., and Mr. *Hardy*, for the Plaintiffs, stated the points which would be raised, and submitted to act as the Court should direct.

Mr. *Willcock*, Q. C., and Mr. *Giffard*, for the Defendant *Green*, the survivor of the four persons named in the will and codicil, was desirous to state, that, in case the Court should hold the trusts in the will for the "Village Itinerancy" to be bad in whole or in part, and that he was entitled under the codicil to the whole or any part of the fund in question, "free from any trust or condition" as there expressed, he should feel bound, having regard to the contents of the will and codicil, to hand it over to the treasurer of the "Village Itinerancy."

It might be material to add, that the principle of the decision of the Master of the Rolls in *Trye v. The Corporation of Gloucester* (a), was reversed a few days ago by the House of Lords, in overruling *Philpott v. St. George's Hospital* (b).

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Mr. Giffard, for the trustees of *Surrey Chapel*, mentioned in the deed of February, 1833, admitted that he could not set up any claim under that instrument.

Mr. Osborne, for the trustees of the "Village Itinerancy" Society, contended, that, it being admitted that the deed of February, 1833, was void under the statute, the fund in question passed under the bequest in the will of the testator's residuary personal estate, and was now subject to the trusts declared of that residuary estate in favour of the "Village Itinerancy."

If some of the objects of that institution, as declared by the deed of 1811, were objectionable as transgressing the law of mortmain, several of those objects were free from all objection. The Court would therefore uphold the bequest, leaving it to the trustees to select the latter. He cited *Crafton v. Frith* (c), *The Mayor of Faversham v. Ryder* (d), *The Church Building Society v. Barlow* (e), *Johnston v. Swann*, (f) and *Trye v. The Corporation of Gloucester* (g); also, *Grimmett v. Grimmett* (h), which, though formerly disputed, had been recently followed by the Lord Chancellor in *The University of London v. Yarrow* (i).

Mr. Rolt, Q. C., and Mr. Kenyon, for the next of kin,

(a) 14 Beav. 173, 196.

(e) 3 D. M. G. 120.

(b) Dom. Proc. 24 July, 1857.
S.C., reported in the Court below,
25 Law Jour. N.S., Ch. 33.

(f) 3 Mad. 457.

(g) *Ubi supra*.

(c) 20 Law Jour. N.S. Ch. 198.

(h) 1 Amb. 212.

(i) 26 Law Jour. N.S. Ch. 430.

(d) 18 Beav. 318.

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contended, that, having regard to the objects of the "Village Itinerancy," as declared by the deed of 1811, the bequest in the will to the treasurer of that society was void under the stat. 9 Geo. 2, c. 36. The objects of that deed were connected by the conjunctive "and," not by the disjunctive "or." The trustees, therefore, had no power of selection, but must apply an aliquot part of every legacy to each of those objects, and some of those objects were manifestly bad, e. g. "the opening and supporting Sunday-schools," and "the erection or providing of places for religious worship."

The VICE-CHANCELLOR.—The deed recites that the society has already "divers freehold and leasehold estates," might they not build schools and places of worship upon the ground so already held by them in mortmain?

Mr. Rolt, Q. C.—But they may spend part of the fund in buying more ground for such erections. The deed of 1811 plainly contemplates that additional land will "thereafter be acquired by and conveyed or assured to and for the purposes of the society."

The VICE-CHANCELLOR.—There is no express trust for purchasing additional land. And although such an application of the funds would not be inconsistent with the trusts of the deed, there is no necessity for their so applying them—there is merely a possibility of their doing so. It will be a very serious matter to many charities if your contention be correct, because many charities *can* purchase land; and if you leave them money, they *may* lay it out in that way. Half the *London* hospitals are not incorporated.

Mr. Rolt, Q. C.—"The question is," as V. C. *Kindersley* said in *Longstaff v. Rennison* (a), "whether it would be a due execution of the trust to buy land."

(a) 1 Drew. 28, 33.

The VICE-CHANCELLOR.—I should respectfully have so far differed from that observation of the Vice-Chancellor as to say "The question is, whether it would be *the* due execution of the trust to buy land."

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Mr. Rolt, Q. C.—The will must be read as if it recited the trusts of the deed of 1811 in extenso, and as if the bequest of this residue were to the four trustees or to the treasurer of the society, to be held upon the trusts of the deed as so recited; then two of these objects being, as we submit they are, clearly bad, either the whole bequest is void, the amount to be apportioned to the remaining objects depending on the amount intended to be apportioned to those two objects, or, at any rate, the proportional parts intended for the latter must belong to the next of kin.

It was contended, that, whatever is not well given to the charity under the residuary bequest contained in the will, passed by the codicil to the Defendant *Green*, and the three deceased persons there named. But that we dispute :

First, because, according to the true construction of the codicil, the bequest to those persons refers, not to the bequest of the general residuary estate to the "Village Itinerancy," but to certain specific bequests and donations, of which there were many, made by the testator in favour of other charities.

Secondly, because, even if we are wrong in that construction, a bequest such as is contained in this codicil, following after a previous gift, which, as to a part at least, is void by the law of mortmain, is a fraud upon that law—being intended to intimidate the next of kin, and prevent their opposing the charity, and therefore void: per Lord *Northington* in the *Attorney-General v. Tyndall* (a).

(a) 2 Eden, 207, 214.

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The VICE-CHANCELLOR.—There the bequest over was upon trust “to lay out the money to such charitable uses as near to the testator’s intention as could be, and the laws would permit.” Can you apply that,—assuming it to be law at the present day,—to a case where the bequest is expressly “free from any trust or condition whatever, expressed or implied?”

Mr. *Kenyon*.—It is so expressed, but it is obvious that there was a trust implied, and that the four persons named were intended to do what the survivor, by his counsel at the bar, now professes he feels bound to do, if the Court holds him entitled, namely, to give the whole to the charity; for here the bequest in the codicil is to the very same individuals who in the will are made trustees for the charity; and that bequest is to them as joint tenants, and not as tenants in common—negating therefore all notion of their taking for their own benefit.

They cited also *Edwards v. Hall*(a), and *Dunn v. Bownas* (b). *Russell v. Jackson*(c) and *Tee v. Ferris*(d) were also referred to.

Mr. *W. D. Lewis*, for another Defendant, took no part in the argument.

The VICE-CHANCELLOR.—I have a strong impression that the able argument I have heard in opposition to the charity has been addressed to me on behalf of persons who have no interest in disputing the claims of the charity. However, I shall look at the authorities cited, and more particularly at the very strong decision of Lord *Northington*(e) before giving judgment.

Judgment reserved.

(a) 6 D. M. G. 74, 86, 87.

(b) 1 K. & J. 596.

(c) 10 Hare, 212.

(d) 2 K. & J. 357, 367.

(e) *Attorney-General v. Tynda*’l,
 2 Eden, 207.

VICE-CHANCELLOR SIR W. PAGE WOOD, after stating the facts of the case, proceeded as follows:—

The question argued before me in this cause was argued principally,—I may say entirely,—by the next of kin of the testator; and I expressed at the hearing that the only points upon which I reserved judgment, had been raised on behalf of persons who had no interest in the question, since it appeared to me, that, if the property in question was not well given by the will to the “Village Itinerancy Society,” there was a clear and distinct gift of it by the codicil of February to the four gentlemen there named; the effect of that codicil being to pass it to them as joint tenants, free from any trust or condition whatever.

It was argued on the part of the next of kin, that the codicil was to be construed as applying, not to the bequest of the general residuary estate to the “Village Itinerancy,” but to certain specific bequests for charitable uses, and that there was no intention on the part of the testator to pass by the codicil what in the will he had described as “the *residue* of his trust moneys.” I cannot so construe the codicil. The testator by that codicil recites that he has by his will and other methods settled and disposed of some parts of his personal estate to charitable uses, and then he declares that in case any part or parts of the same should by any statute or law then in being be considered not to have their full operation for the intents and purposes for which he had designed them, then he gave and bequeathed all such money, property, personal estate and effects to the four gentlemen there named. Now, although there is in the will a general gift of the residuary estate, the gift in question is by no means a gift of the whole estate, because the testator had given considerable parts to other charities; and the gift in question, although given by the

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will as residue, if not well given to the charitable uses for which it is therein expressed to be given, appears to me to be clearly given over by the codicil to the parties named.

But then Mr. *Kenyon* cited a case of the *Attorney-General v. Tyndall*(a), in which Lord *Northington*, amongst other propositions which he there determined, expressed his opinion that where there was a bequest which was void under the statute, and that bequest was followed by a direction that in case the testator's intention could not by law take effect, the trustees should lay out the money to such charitable uses as near to the testator's intention as the law would permit, the gift over was void, as being in fraud of the mortmain law, and intended to intimidate the heir and next of kin, and to prevent their opposing the charity(b).

Now, in the *Attorney-General v. Tyndall*, three propositions were determined by Lord *Northington*: one in opposition to the view taken by Lord *Hardwicke* in the *Attorney-General v. Bowles*(c). And as to this, Lord *Northington's* decision has been since affirmed by the current of authorities in opposition to Lord *Hardwicke*. The two other propositions have not met with approbation.

As regards the first, Lord *Hardwicke* had held in the *Attorney-General v. Bowles*, that a gift for the purpose of erecting a hospital, building a school, or the like, might be supported, provided land could be found for the erection, although the will were silent on that subject. Lord *Northington*, on the contrary, held that it could not be presumed that the testator intended his trustees to go about begging for land, as he described it; and that the trust must be taken in its full sense, and as if the testator had expressed it to be his intention that the trustees should purchase land

(a) 2 Eden, 207.

(b) Id. 214.

(c) 3 Atk. 806; S. C., 2 Ves. sen. 547.

upon which the building should be erected. This view of Lord *Northington's* has been affirmed by subsequent decisions.

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The propositions in which he has not met with approbation are, first, that the building on land already held in mortmain, inasmuch as it improves the estate, and renders it more valuable, is a transgression of the statute—a doctrine that has been repeatedly overruled in a series of subsequent decisions. And secondly, the proposition relied on by Mr. *Kenyon*, that a gift over for charitable uses, not void by the law of mortmain, in the event of the previous gift being void by that law, must be taken as intended in *terrorem*, and be held a fraud upon the mortmain law.

As regards the last of these propositions, I find no decision in which it has been followed; but I do find a decision of Sir *John Leach* which is directly contrary. It is in the case of *De Themmines v. De Bonneval* (a), which was decided after great consideration, although, singularly enough, the *Attorney-General v. Tyndall* does not appear to have been referred to in the argument. There, the Plaintiff, who was a foreigner, or at least a person not naturalised at the time, caused a sum of stock to be transferred into the names of *King* and three others; and a deed was then executed, by which they declared that they should hold the stock upon trust to pay the dividends to the Plaintiff for life, and after his death to apply them to certain uses which our law deems superstitious; and the deed then contained an express proviso, that, if the trusts therein mentioned, or any of them, should by any court of law or equity be adjudged to be void, or incapable of being performed or carried into effect, the trustees should stand possessed of the stock upon trust for the executors or administrators of the Plaintiff. On the first hearing Sir *John Leach* said, that

(a) 5 Russ. 288.

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such a proviso was open to the question, whether it was not in fraud of the law that money given to superstitious uses belongs to the king, to be applied to other charitable purposes not superstitious. And although he could give no opinion upon the point, he must hear the *Attorney-General* upon it. The cause stood over accordingly for the *Attorney-General* to be made a party on a subsequent day. Mr. Wray was heard for the Crown, and eventually Sir John Leach held, that the limitation over was a valid limitation, and decreed a retransfer of the stock to the Plaintiff.

Among the numerous cases on this branch of the law, I do not find any which has carried the law further in reference to such a gift over; but there are many cases in reference to the law of perpetuity, where there are limitations over, in the event of previous limitations being found to operate in fraud of any rule of law, and where it has never occurred to any one, so far as I am aware, to argue that the limitation over is void as being in fraud of the law, or intended merely in terrorem to prevent the party who might otherwise claim from disputing the previous gift.

In this case, however, *De Themmines v. De Bonneval* is an authority directly in point; and it is clear to me, that, whatever my view may be upon the further point, the next of kin can take no interest; and that, even if the property be not well given to the "Village Itinerancy," it is well given by the codicil to the four persons there named.

I do not attach any weight to the circumstance that the four persons to whom the bequest is made by the codicil are the same persons as those who by the will are made trustees for the charity. That bequest is expressed by the codicil to be made to them "free from any trust or condition whatever, expressed or implied;" and that being so, it is impossible for this Court to intend any trust, unless it

can convert the legatees into trustees, by proof of some communication between them and the testator, importing that the testator intended a trust, which they in effect undertook, and by which, therefore, their consciences would be bound. Here no such case is attempted to be made; and if I were to hold this to be a trust, it would follow, that, in every case where a legacy is given to A., evidence would be admissible to shew that it was intended to be in trust for B., notwithstanding it is expressed to be given to A. free from any trust or condition whatever.

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Of course, I am not adverting to a case like *Russell v. Jackson* (a), where the testator had communicated his intentions to one of two devisees, who promised that they should be carried into effect. And the Vice-Chancellor held, that this affected the other devisee, since he thought it clear that the devise would not have been made to the latter, but for the promise given by the former that the intentions of the testator should be carried into effect (b).

I now come to the main point to be decided, namely, whether the property in question passes by the codicil, or whether it is well given by the will. The will purports to give it to the Treasurers for the time being of the Society or Institution called "The Village Itinerancy or Evangelical Association for the Propagation of the Gospel." Now the rules of that society are these:

[His Honour stated them from the deed of 1811, and read the recitals from that instrument, as printed above.]

Construing that deed first by itself, there can be no doubt that it is not incumbent upon the trustees to apply any given portion of their funds to all or to any one of the ob-

(a) 10 Hare, 212.
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(b) Vide *Tee v. Ferris*, 2 K. & J. 367.
R R K. J.

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 —
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jects specified in the deed. They are at liberty to select any one or more of those objects. For instance, if a legacy of 1000*l.* be given them they may apply the whole, if they think fit, in distributing Bibles and religious books, or they may apply the whole in building upon land already held by them in mortmain. No doubt, the deed does not prevent them from applying a part or even the whole of it in purchasing other land, and that is the point on which the difficulty in this case has arisen. But the deed does not *require* them to apply any portion of it in purchasing additional land. So far as the deed is concerned, they have the option of applying the whole to any one or more of the legitimate objects specified in the deed. I cannot hold, that, whenever any property comes to their hands upon the trusts of this deed, they are bound to apply it in aliquot parts to each of the objects which the deed specifies.

That being so, suppose the testator had introduced the contents of the deed into his will ;—that he had recited, as the deed does, that the charity had such and such funds; that it had already divers freehold and leasehold lands, and might acquire more; and that its object was the promulgation of the gospel by all (which I hold to be “by all or any one or more”) of the means specified in the deed; and having so recited the deed in his will, suppose the testator had then bequeathed the property in question to the trustees of the charity upon the trusts declared in that deed,—putting it in that way,—and it was in that way that it was argued by those who disputed the title of the charity,—it appears to me that I have a case before me, that of *The Attorney-General v. Parsons* (a), which would exactly meet the case in question, and which shews that I should be at liberty to hand over this fund to the trustees of the charity, without any violation of the Statute of Mortmain.

(a) 8 Ves. 186.

The case of *Sorresby v. Hollins* (a) and that of *Grimmett v. Grimmett* (b), before Lord *Hardwicke*, establish that, where there is a discretion given to trustees to apply a bequest in the alternative, either in a way which is legitimate, or in a way which would be illegitimate under the statute, the Court will uphold the bequest, inasmuch as it may be applied legitimately. But it occurred to me, during the argument, that there was a difficulty in this respect, that, by handing over the fund to the trustees, the Court would part with its control: that, to call upon the Court to hand it over to the trustees was very different from calling upon the Court to execute the trusts; since, in the latter case, the Court would take care to execute such trusts only as were legitimate. However, *The Attorney-General v. Parsons* (c) meets that very case.

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—
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There, *Edward Tawney*, by an indenture of bargain and sale, dated the 17th of January, 1797, duly executed according to the statute and enrolled, conveyed to the mayor, bailiffs, and commonalty of the city of *Oxford*, certain freehold property for the purpose of erecting almshouses. Having done that, he by his will gave to the mayor, bailiffs, and commonalty and their successors, for ever, 4500*l.* stock in the 3*l.* per cent. Consolidated Bank Annuities, upon trust to pay the interest and dividends thereof from time to time as the same should become due, for ever, in manner thereafter mentioned: 20*l.* a year each, by equal half-yearly payments, to three poor men and three poor women of the city of *Oxford*; and, from and after payment thereof, in trust to pay, lay out, and expend, as occasion should require, the residue of such yearly interest and dividends, at such times and in such manner as the trustees thereafter named should direct, in rebuilding, repairing, altering, or adding to and improving the messuages or tenements,

(a) 9 Mod. 221. (b) 1 Amb. 212. (c) 8 Ves. 186.

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 Judgment.

ground, and appurtenances conveyed by him the testator unto the mayor and bailiffs.

Now, it is obvious, that, if that clause be read as Lord *Eldon* held it must be read, so as to authorise the adding, not only to messuages or tenements on ground which the testator had already effectually given in mortmain by the deed, but also to that ground itself, you have then a trust similar to that now before me, as regards the possibility that these trustees may apply the whole or a part of any particular legacy in purchasing fresh land, which would be illegal. The objection was pressed upon Lord *Eldon* by Sir *Charles* (then Mr.) *Wetherell*, who claimed against the charity. He said, one question was, whether, under the words "adding to," the testator did not intend that the trustees should, if they thought fit, purchase land for the charity; and then, one object being illegal, whether the whole were not vitiated. He admits that *Sorresby v. Hollins* establishes that the expression being in the alternative would save some part of the trust; but he disputes the authority of *Grimmett v. Grimmett*; and then he cites *Chapman v. Brown* (a), where, there being a trust by will for building or purchasing a chapel, (which was a bad bequest under the statute,) and if any overplus, then for such charitable uses as the executors should think proper, (which, taken alone, would have been a legitimate object), Sir *W. Grant*, M. R., held the whole to be void, for the two trusts were inseparable, the overplus depending on how much the executors would have employed in building a chapel; and upon that question any inquiry would be vague and indefinite to a degree almost ridiculous; and it being so uncertain what the residue would have been, he held the trust as to that void for uncertainty.

But Lord *Eldon* deals with that argument in this

(a) 6 Ves. 404.

way:—After disapproving of *The Attorney-General v. Tyndall*, so far as that case determined that a bequest of money for building on land already held in mortmain was void, and approving of it so far as it determined that a bequest to erect a charitable foundation imports that land is to be bought, unless the will manifests a purpose that it is to be otherwise procured, he says this: “Therefore, declare that the legacy of 4500*l.* is good so far as the payment of 20*l.* a year each to three poor men and three poor women according to the will; also so far as the surplus is directed by the will to be applied in rebuilding, repairing, altering, or improving the messuages or tenements, grounds, and appurtenances, and so far as the additions directed by the will shall be made upon the land conveyed by the testator for the better residence of such poor men and women: but that it is bad, so far as any additions are to be made to the ground by acquiring other land.” Nothing more is said upon that, but it is manifest that the fund was handed over with that declaration to the trustees. There is no direction to apportion, nor would it have been possible to apportion, how much of the fund would be applied to one purpose, and how much to the other.

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—
Judgment.

I intend to follow that precedent, and I shall declare that the bequest to this charity is good, coupling that declaration with a further declaration that the application of any part of the fund in question towards the purchasing of any additional land by the charity would be an illegal application of the bequest.

Mr. *Kenyon*.—I understand it is conceded that the next of kin will have their costs as between solicitor and client.

The VICE-CHANCELLOR.—That depends upon the charity.

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 Judgment.

Mr. *Kenyon*.—It has been decided, that, in charity cases, where no improper point is raised on behalf of the next of kin, they are entitled to the costs as between solicitor and client. The authority is *Gaffney v. Hevey* (a).

The VICE-CHANCELLOR.—I am glad it is so. I was not aware of it.

(a) 1 Dr. & Walsh, 25.

July 20th.

BROOKE v. GARROD.

Vendor and
 Purchaser—
 Pre-emption
 —Laches—
 Will.

A person having under a will a right of pre-emption of an estate for a given sum, provided he signified to the trustees within one month of the testator's death his option to purchase, and paid the

purchase-money within a further period of two months, duly signified his option to the trustees, and applied to their solicitor for an abstract of title. The solicitor acknowledged this application, and promised to take an early opportunity of seeing his clients thereon. But no abstract was furnished; and, hearing nothing further, the donee of the right of pre-emption allowed the two months to expire without paying his purchase money, or taking any further step in the matter.

Held, that, under the circumstances, and according to the true construction of the will, the trustees were not under any obligation to furnish an abstract; and the purchase money not having been paid within the two months, the right of pre-emption was lost, the rule being that such a right must be strictly complied with.

Semble, that, even if the trustees had been under any such obligation, still the donee of the right, having allowed the stipulated period to expire without taking any further step, could not, as against the parties beneficially interested in the proceeds of the sale, insist on the trustees' laches as giving him a right to an extension of time for completing his purchase.

But *semble*, that, had there been fraud on the part of the trustees, or possibly such laches on their part as the Court could consider to have been the sole cause of the donee of the right of pre-emption not complying *modo et forma* with the conditions imposed by the will, the latter might have been entitled to relief.

of his decease, or should not, within one calendar month after that event, signify to the said trustees his intention to accept or take the said hereditaments and premises at the price or sum aforesaid, or should not, at the expiration of two calendar months from the time of signifying such his intention, pay the said sum of 2500*l.* to the said trustees as aforesaid, then the testator directed his trustees to sell the premises by public auction or private contract as in his will mentioned. And the testator directed his trustees to stand possessed of the moneys to arise from such sale, or in the event of *Mallows* electing to accept and take the premises at the price or sum aforesaid, then to stand possessed of the said sum of 2500*l.*, upon certain trusts, for the benefit of his brother *William* and his sisters.

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—
Statement.

The testator died on the 11th of October, 1856.

On the 29th of October, 1856, *Mallows*, through his solicitor, signified to the trustees of the will his intention to become the purchaser of the property for 2500*l.*

On the 1st of November his solicitor wrote to the solicitor of the trustees requesting to be furnished with the necessary abstracts of title, as early as possible, that the matter might be carried through in accordance with the trusts of the will. To his letter, which is set out in extenso in the judgment, the solicitor of the trustees replied, "I beg to acknowledge the receipt of your favour, and will take an early opportunity of seeing my clients thereon."

Nothing further passed between the parties until the 14th of January, no abstract of title was furnished on the part of the trustees, nor was the purchase money paid, or any conveyance tendered on the part of *Mallows*.

Subsequently to the 14th of January, 1857, a correspon-

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Judgment.

Mr. *Kenyon*.—It has been decided, where no improper point is raised kin, they are entitled to the costs client. The authority is *Gaff*.

The VICE-CHANCELLOR
aware of it.

July 20th.

Vendor and
Purchaser—
Pre-emption
—Laches—
Will.

A person having under a will a right of pre-emption of an estate for a given sum, provided he signified to the trust within one month of testator's death, the purchase money.

HENRY
being se
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contr
his

Hastings, for the Defendant *Mal*—
that he was still at liberty to avail himself
given him by the will of purchasing the pro-
2500*l*. It was true, that, where a right of pre-
emption is given by a will, the conditions upon which that
right is given must be complied with, *so far as depends*
upon the purchaser (a); but here the purchaser had signi-
fied his intention to purchase long before the expiration of
the period prescribed by the will, and would have com-
pleted his contract and paid his purchase money, had he
been furnished with the requisite abstracts of title. Those
abstracts were necessary to enable his solicitor to prepare
the conveyance. The trustees, by their solicitor, promised in
effect to furnish them, or at any rate induced him to expect
them till the two months had elapsed. Such dilatory con-
duct and laches on the part of the trustees ought not to
affect the rights of the intended purchaser: *Gaskell v.*
Harman (b).

(a) Sugden's Vendors and Purchasers, p. 205, 11th edit.

(b) 11 Ves. 507.

CASES IN CHANCERY.

1857.

the Plaintiffs

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Argument.

(a), which would be cited contra, was the son to whom the right of pre-emption was in his own hands, and not by any person but himself in question. Besides, the agreement. Here *Mal- se* at 2500*l.* was in enforce under the

Pegg v. Wis-
den (d).

God and his sisters, contend-
having been paid or tendered by
within the period prescribed by the will,
but now to be sold by auction by the trustees.
upon the rule, that, where a right of pre-emption
given by will it must be exercised modo et formâ accord-
ing to the terms of the gift; that, where a given time is
limited, that condition must be strictly observed: *Barrell v.*
Sabine (e), and that it is for the party claiming the privilege
to shew that he has paid his purchase money within the
stipulated period, *Davis v. Thomas (f)*—a rule recognised
in *Pegg v. Wisden*, cited contra, although there, upon
special grounds, the Master of the Rolls held, that time
was not essential.

He contended also, that, for reasons mentioned below in
the judgment, the trustees were under no obligation to fur-
nish *Mallows* with any abstract of title; and that, even if
they were under any such obligation, their omission to fur-
nish an abstract did not amount to such laches as to entitle

(a) 8 Sim. 346.
(b) 1 Beav. 152.
(c) 18 Id. 239.

(d) 11 Ves. 448.
(e) 1 Vern. 269.
(f) 1 Russ. & My. 506.

CASES IN CHANCERY.
not within one calendar month
did trustees his intention to
s, and premises at the
the expiration of
such his
trustees
sell

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Argument.

Mallows as against third persons to an extension of time for payment of his purchase money, citing, on this point, *Dawson v. Dawson* (a).

He cited also *Master v. Willoughby* (b), and *Smith v. Pawson* (c).

Mr. *Osborne* replied.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I may take this to be a trust with a double aspect, of this description: a trust to convey the property to *Mallows Garrod* at the price or sum of 2500*l.*, provided that he do, within one calendar month after the testator's death, signify his intention to take it at that price, and that he do, within two calendar months after signifying that intention, pay the sum of 2500*l.* to the trustees; and if he does not do both, then the trustees are to hold the property upon trust to sell generally.

On the one hand, therefore, if *Mallows*, within a month from the testator's death, signified his intention to purchase the property, and paid the stipulated sum within two months from the time when he so signified his intention, the trustees had no option as against him, but were bound to execute the conveyance. On the other hand, if both conditions were not complied with by *Mallows*, the trustees had no option as against the other parties interested under the will, but were bound to sell by auction.

This right of pre-emption was a privilege given to *Mallows*, and, being so, the conditions were conditions with which he was obliged to comply strictly. The case is

(a) 8 Sim. 346.

(b) 1 Bro. P. C. 126, fol. edit.

(c) 25 Law Times, 40.

somewhat analogous to a case between vendor and purchaser where time is made of the essence of the contract, and the parties have not by their dealings waived their rights as to time being of the essence of the contract.

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Judgment.

Had there been anything in the shape of fraud on the part of the trustees, or had there been such a degree of laches on their part as to induce the Court to say that such laches were the sole cause of *Mallows* not complying *modo et forma* with the conditions imposed by the testator,—a more difficult case as regards those who take subject to the conditions not being complied with—it is possible, to say the least of it, that the Court might have given *Mallows* some relief in that respect.

But the case on the evidence is this:—*Mallows* indicated his intention to become the purchaser of the property on the 29th of October, 1856,—very early after the testator's death, which took place on the 16th,—so that he was clearly within time so far as regarded the first of the two conditions. Having done this, it became his duty, by the 29th of December, to pay the purchase-money; and had he so done, then, on such payment being made by him, it would have become the duty of the trustees to execute the conveyance to him of the property.

His next step is a singular one, and not very indicative of an intention of fairly completing the purchase. It appears that he had been co-owner with his brother, the testator, of the property in question, and had concurred with him in mortgaging the property. Either, therefore, the abstract of title to the property must have been left with them,—in which case it would be in *Mallows'* possession as much as in his brother *Henry's*, or it must have been in the possession of the mortgagees. That being the case, his solicitor, after he had duly given notice of *Mallows'* intention to become the purchaser, on the 1st of November,

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 v.
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 —
Judgment.

1856, writes this letter to the solicitor of the trustees:—"I did not know until to-day that you were concerned for the executors herein. My client, Mr. *M. Garrod*, wrote to me on the 28th ult., requesting me to give notice to his late brother's executors, that he would accept the estate at the price it was directed to be offered to him, and to-day he has called with a copy of his brother's will, and placed the matter in my hands." Here, therefore, I have *Mallows Garrod* clearly aware of all the conditions which it was necessary for him to observe, in order to become the purchaser of the property at the price mentioned in the will. He has a copy of the will, and leaves it with his solicitor. His solicitor continues, "I presume there will be no difficulty in carrying out the testator's directions, as Mr. *M. Garrod*, through me, has signified his intention to take the estate at the price fixed thereon by his brother, and I have informed the executors thereof. I will thank you, therefore, to send me the necessary abstracts of title as early as possible, that the matter may be carried through in accordance with the testator's will."

That is a somewhat singular application on the part of *Mallows*, he having already an entire abstract of title down to the mortgage of 1846; and although there was a possibility that the testator might have made some mortgage since that date, so that, in that view, it might not be an unreasonable request, still, from the subsequent correspondence, I rather collect that the object of *Mallows* in making it was to reserve to himself an option, in case he found a flaw in the title, to fly off and withdraw from the notice he had given signifying his intention to purchase.

Now, such an option as that is a right which I do not think the testator intended to offer him. He intended to offer him the option of purchasing, "Aye or no,—will you take it at the price I name? And if you agree to take

it, I expect the purchase-money to be paid within the time I have limited."

The circumstance on which Mr. *Osborne* relied, as shewing that there had been—he could not say fraud, for that would have been much too strong a term, but—laches on the part of the trustees, from which, he says, *Mallows* ought not to suffer, is the letter written by the solicitor of the trustees in answer to that which I have just read. He says, "I beg to acknowledge the receipt of your favour, and will take an early opportunity of seeing my clients thereon." He does not say whether there will be any difficulty or not; but that he will inform his clients that *Mallows* has asked for an abstract. That is the strongest construction that can be put upon his answer in favour of Mr. *Osborne's* contention. But, assuming that the solicitor did tell his clients that *Mallows* had applied for an abstract, the latter does not take a single step from that time till the 14th of January,—seventeen days after the two months had expired. Up to that time he never evinces the slightest anxiety to complete his purchase under the notice he had given.

Assuming, then, that the trustees were under an obligation to furnish *Mallows* with such an abstract as he had required, the question is, whether I am to say that the mere fact of their continuing, for two or three months, not to furnish any abstract, would, in the absence of any further application—of any the slightest movement on his part to accelerate them,—be such laches on the part of the trustees as would entitle him, as against the other parties beneficially interested under the will, to an extension of time. He had the will before him. He knew the prescribed time within which the money was to be paid; and the question is, whether I am to say that the mere fact of their not answering a letter, when he takes no further step, keeping the money in his pocket without the least effort to bring the

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Judgment.

matter to a conclusion, is to be taken as simply laches on the part of the trustees, and no laches on the part of the intended purchaser.

I confess, if it had been the ordinary case between a vendor and purchaser, with a condition that time was to be of the essence of the contract, I could not say that it was not the purchaser's laches if he simply asked for something which the vendor failed to furnish, and did no more, but remained expecting an answer until the stipulated time had expired. But to say that there have been such laches on the part of the trustees as to prevent the purchaser from proceeding with his purchase is impossible. He cannot say, that something that they have done or failed to do has inevitably prevented him from completing his contract. The case does not depend on a condition being fulfilled by third persons, but on the simple question whether there has been such negligence on the part of the trustees as to vary the rights of persons beneficially interested under the testator's will.

The subsequent correspondence shews, as I have already mentioned, that his object in applying for the abstract was inconsistent with the intentions of the testator. He does not say he wants it to enable him to prepare a conveyance. He does not prepare a conveyance or tender the money. He does nothing to put himself right as regards the will. And it seems to me that the case falls within the authority of *Dawson v. Dawson* (a), and the earlier case of *Master v. Willoughby* (b), where the legatee had the right to purchase for 6000*l.* an estate worth 10,000*l.*, provided she tendered the money within a given time. She filed a bill; but, not having tendered the money within the time, she was held not to be entitled to the benefit of the contract.

I cannot say, therefore, that, as against third persons,

(a) 8 Sim. 348.

(b) 1 Bro. P. C. 125, fol. edit.

this benefit has not been lost, and entirely lost, by the laches of the beneficiary.

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Judgment.

There must be a declaration that the purchase-money, or sum of 2500*l.*, not having been paid or tendered by *Mallows Garrod* within the period prescribed by the will, the testator's estate ought now to be sold by auction by the trustees.

Mr. *Dart*.—The trustees having full power to sell, I submit that it is needless to put the estate to the expense of selling it in Court.

The VICE-CHANCELLOR.—The trustees have brought the matter on, taking it out of the trusts of the will. The common course, therefore, is to have a sale in Court.

CARTER v. CARTER.

July 7th, 8th,
and 24th.

BY a will dated the 12th of January, 1846, and which for many years after his death was supposed to be his last will, *Edwin Carter* gave and bequeathed all his freehold, copyhold, leasehold, and residuary personal estate unto his brothers and sisters, and the survivors or survivor of them: the proceeds of the rentals to be equally divided among them, share and share alike.

Mortgage—
Priority—
Notice—Purchaser without
—Estoppel—
Possession of
Deeds—Forfeiture on Alienation—Copyholds—Surrender by Attorney.

Review of the principal authorities on the protection afforded by this Court to a purchaser for valuable consideration without notice of a prior incumbrance, where he has got in the legal estate or obtained possession of the title deeds.

Semble, the earlier authorities on this subject have gone to a greater length than would be supported by more modern decisions.

The authorities establish that a purchaser from a person in possession, purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from a trustee of a satisfied term, or a mortgagee whose mortgage is satisfied, will be protected in this Court against a prior incumbrancer or cestui que trust, provided the party so conveying the legal estate have no notice of the prior trust or incumbrance.

But it has never yet been decided, that, where the party so conveying has notice of an express prior trust or incumbrance, the purchaser can protect himself therefrom by means of the legal estate.

And *semble*, such a decision would be contrary to the principles of this Court.

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 v.
 CARTER.

The testator died in January, 1847. He left eight brothers and sisters living at his death, the Defendant John Carter, the younger, being one.

Statement.

The supposed will was proved and acted upon for several years after the testator's death, all parties interested under it believing it to be the last will of the testator.

J. C., believing himself and three others to be entitled under a will to four-eighths of certain freehold and copyhold estates, joined them in a mortgage of all his estate in the four-eighths to *P.* Subsequently it was discovered that the supposed last will had been revoked by a later will, by which all the estates were devised to *J. C.* for life, but subject to several annuities, with remainders over.

Held, that the mortgage to *P.* passed *J. C.*'s life interest in the entire four-eighths, and was the first incumbrance on one-eighth of the copyholds to which *P.* had been admitted. But,

Held, further, that, although *P.* had acquired the legal estate in this one-eighth for valuable consideration, as it were, by accident, and without notice that the former will had been revoked, so that his conscience was not affected by any of the trusts to which, by the subsequent will, the estate was subjected, he must hold subject to those trusts, since the will by which they were created was the very instrument upon which his title to the legal estate depended. And,

Semle, the absence of fraud on the part of the mortgagor did not affect the question.

Estoppel.—Estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action or proceeding there can be no estoppel.

Therefore, although the mortgage to *P.* recited that the first will was the last will, and was not revoked, and that under the first will three other persons, parties to the deed, were entitled to three-eighths, which they mortgaged to *P.* thereby, this did not prevent a prior mortgagee from showing in a suit for administration of testator's estate, that the recital was untrue, and that by the real last will the three-eighths in question were vested in *J. C.* for life.

Possession of Deeds.—In order to postpone any party to a cause in respect of a prior mortgage or incumbrance on the ground that you have got the title deeds, it must be shewn that you have got them through gross negligence on the part of the person you seek to postpone; and the onus is on you of shewing this.

Instances of gross negligence and the contrary.—To allow title-deeds to remain with a party, who, besides having a beneficial interest in the property, is also a trustee for others, not gross negligence; for, *quod trustee*, he is the right person to hold them.

To allow them to remain with one of several tenants in common after he has mortgaged his share, not gross negligence—*Semle*.

Forfeiture.—Three other persons named in the first will as tenants in common, believing themselves entitled under that will each to one eighth, executed mortgages of their supposed shares and all their estates and interests in the testator's estates. They had, in fact, under the subsequent will annuities merely, charged on the testator's estates, and given to them for life, or until they should do any act which but for that condition would have the effect of alienation.—*Held*, that the annuities ceased from the dates of such mortgages respectively, notwithstanding the annuitants were then in ignorance of the existence of the will restraining alienation.

But, *semle*, had such mortgages been of all their shares under the first will, and all their estates and interests in the premises thereby mortgaged, *secus*.

Copyholds—Admittance—Surrender.—Where copyholds are surrendered by attorney, and the attorney exceeds his power, the admittance is cut down to the limits of the surrender authorised by the power.

Observations on *Faussett v. Carpenter*, (2 Dow & Cl. 232).

Several years afterwards, a later will was discovered, which bore date the 25th of April, 1846, and which eventually proved to be the real last will of the testator.

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CARTER
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By this last-mentioned will, the testator, after directing payment of his debts and funeral and testamentary expenses, and bequeathing certain pecuniary legacies, gave, devised, and bequeathed unto his brother the Defendant, *John Carter* the younger, and to two other persons, (who by deed disclaimed), all his freehold, copyhold, and leasehold lands and hereditaments, and certain debts due on bond, to hold the same unto and to the use of the said devisees, their heirs, executors, administrators, and assigns for ever, upon trust to pay to his mother an annuity of 400*l.* during her life, and to pay to each of his brothers *Edward*, *George*, and *Charles*, an annuity of 100*l.* during his life, or until he should take the benefit of any Act for the relief of insolvent debtors, or become bankrupt, or do any act which, but for that condition, would have the effect of giving the benefit of his annuity to any other person; and in the event of either of such last-mentioned events happening, then his annuity should from thenceforth cease and be no longer payable;—and to pay to each of his sisters *Eliza*, *Frances*, and *Louisa*, an annuity of 100*l.* during her life. And after payment of the said several annuities, and subject thereto, upon further trust for the Defendant *John Carter* the younger, during his life; and after his decease, subject to the payment of the said several annuities, or such of them as might be then subsisting, and to certain trusts for the benefit of the children of the said *John Carter* the younger (who had no issue), upon trust for such of his said brothers *Edward*, *George*, and *Charles*, and his said sisters, as might then been living, and the survivors and survivor of them, for life; but, as to his said brothers, subject to the same restrictions respecting bankruptcy and insolvency, and against alienation, as he had thereinbefore made and provided for

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with reference to the aforesaid annuities bequeathed to them respectively; and after the decease of the survivor, upon certain trusts for the benefit of the children of his last-mentioned brothers and sisters.

A suit was instituted by two of the testator's sisters and the infant children of his third sister, for administration of his estate; and a decree having been made directing the usual inquiries as to incumbrances by the parties interested under the will, the Chief Clerk certified that the Defendant, *John Carter* the younger, previous to his bankruptcy, incumbered his life interest under the testator's will as follows:—

By an indenture, dated the 1st of June, 1850, he conveyed, assigned, and covenanted to surrender all his estate and interest in the freehold, copyhold, and leasehold estates in the decree mentioned to the Defendant *John Carter* the elder, by way of mortgage, to secure 3110*l*.

By an indenture, dated the 28th of June, 1852, he conveyed his interest in two undivided eighth parts or shares of such of the freehold estate as is therein comprised, to *W. P. Chilcott* and *A. Chilcott*, by way of mortgage, to secure 1200*l*.

By an indenture, dated the 10th of September, 1852, he conveyed, assigned, and covenanted to surrender his interest in four undivided eighth parts or shares of certain parts of the estate to *James Prosser*, since deceased, by way of mortgage, to secure 2000*l*. And by a surrender in pursuance of the covenant contained in the said indenture, one-eighth of and in such of the copyhold estates described in the said indenture as were situate in the manor of *Liswerry* and *Libneth*, in the county of *Monmouth*, were on the 4th of December, 1852, surrendered to *James Prosser*, subject to

a proviso to make void the same upon payment of the mortgage money on a day past; and *James Prosser* was on the 22nd of December, 1854, admitted tenant thereof.

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By agreement, dated the 1st of September, 1854, he created an equitable mortgage on his life interest in two undivided eighth parts or shares of such other parts of the leasehold estate as are therein mentioned, to the *Chilcotta*, to secure 350*l*.

By indenture, dated the 4th of January, 1853, he assigned his life interest in such part of the estate as consisted of the leasehold tithe rentcharge of the chapelry of *St. Lawrence*, with eight acres of land lying beside the same, to *William Tiley*, by way of mortgage, to secure 250*l*.; and he thereby covenanted to assign all the estate to be taken by renewal.

By indenture, dated the 16th of October, 1854, he conveyed, assigned, and covenanted to surrender his life interest in the whole of the said freehold, copyhold, and leasehold estates to *P. F. Aiken* and *W. G. Coles*, by way of mortgage, to secure 4000*l*.

By an indenture, dated the 21st of November, 1854, having obtained a renewed lease of the said tithe rentcharge, he assigned the same to *Tiley*, by way of mortgage, to secure the said sum of 250*l*.

The Chief Clerk further certified, that all the above indentures were executed at the time when *John Carter* the younger supposed he was entitled under the will of January, 1846; and that such indentures were respectively so expressed as to pass the life estate to which he was in fact entitled under the testator's last will to the extent above mentioned; that the surrender to *James Prosser* was made by *John Carter* the younger and three of his brothers, all

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and each of whom purported by attorney to surrender four-eighths and all other shares of them and each of them, and to which they had been admitted on the 14th of August, 1852; but the attorney by whom such surrender was made was only authorised by each of the four parties to surrender his one-eighth; and by the said admission on the 14th of August, 1852, the eight brothers and sisters of the testator were admitted as devisees under the first will as tenants in common; and that *John Carter* the elder, by indenture, dated the 13th of April, 1855, transferred, by way of sub-mortgage to secure 2730*l.* and interest, the above-mentioned mortgage of the 1st of June, 1850, to *J. S. F. B. Bromage*, *J. P. Snead*, and *J. B. Snead*.

It further appeared by the certificate, that the testator's two brothers, *George* and *Charles*, at times when they supposed they were entitled each to one-eighth of the estates under the will of the 12th of January, 1846, respectively executed indentures, by which they purported to convey and assign and covenanted to surrender each his one-eighth part, and all his estate, interest, claim, and demand in the whole of the testator's estates. Also, that the testator's brother *Edward*, at a time when he supposed he was entitled to one-eighth under the same will, executed an indenture, dated 1854, by which he purported to convey and assign, and covenanted to surrender, all his parts or shares, present and expectant or future, vested or contingent, of and in all the estates of, in, or to which the testator was seised or entitled, and which passed or were devised or bequeathed by the will of January, 1846, and all his estate, interest, term, benefit, claim, and demand whatsoever, both at law and in equity, of, in, to, or out of the same hereditaments and premises "hereby granted and assigned and covenanted to be surrendered respectively" to *Charles Carter* by way of mortgage. The Chief Clerk, by his certificate, stated that *Edward* had executed several prior deeds, the

first of which was dated the 23rd of January, 1850, but that such prior deeds were not in evidence.

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The Chief Clerk, by his certificate, stated the priority of the incumbrances on the life interest of the Defendant *John Carter* the younger under the testator's will to be as follows: that the mortgage to *John Carter* the elder, of June, 1850, was the first incumbrance upon all the estates except the one-eighth of part of the copyhold estate surrendered to *James Prosser*, and except the leasehold tithe rentcharge and land comprised in the mortgage to *Tiley*; and the second, on such excepted copyhold and leasehold estates; that the mortgage to *Tiley*, of November, 1854, was the first incumbrance upon the leasehold tithe rentcharge and land therein comprised; that the mortgage to the *Chilcotts*, of June, 1852, was the second incumbrance on two-eighths of the part of the freehold estate therein comprised; that the mortgage to *Prosser*, of September, 1852, was the first incumbrance on one-eighth of the copyhold estate surrendered to him in pursuance of the covenant therein contained, and the second incumbrance on the three other eighths of the same portion of the copyhold estates, and on four-eighths of the other copyhold estates in the said deed covenanted to be surrendered, and of the freehold and leasehold estates therein comprised; that the equitable mortgage to the *Chilcotts*, by the agreement of September, 1854, was the second incumbrance on two-eighths of such part of the leasehold estate as was therein comprised; and that the mortgage to *Aiken* and *Coles*, of October, 1854, was the last incumbrance on the whole of the estates.

The Defendants, the *Chilcotts*, *Anne Prosser*, *Aiken*, and *Coles* claimed priority in respect of their mortgages over the mortgage of June, 1850, to *John Carter* the elder, upon the alleged ground that *John Carter* the elder, after the mortgage to him, gave the title deeds back to *John Carter*

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the younger, and such of the title-deeds as related to the estates in their respective mortgages were delivered to the *Chilcotts* and *Prosser*, who had no notice of the prior mortgage to the said *John Carter* the elder. At their request this question, inter alia, was reserved for the opinion of the Court.

The Defendant *Anne Prosser*, as administratrix of *James Prosser*, contended in chambers, that, by virtue of the surrender and admission of *James Prosser* to four-eighths of the copyhold estate within the manor of *Liswerry* and *Libneth*, he became seised of the legal estate therein, and he having acquired the same for a valuable consideration without notice that the said will of January, 1846, had been revoked, she claimed to be entitled to the said four-eighths as against all persons claiming under the will of the testator, until she should be redeemed.

It appeared that the mortgage to *Prosser* of the 10th of September, 1852, contained a recital that the will of January, 1846, was the last will of the testator, and that the testator died without having revoked or altered it. The testator's brothers, *Alfred*, *George*, and *Charles*, were parties to this mortgage as well as *John Carter* the younger, and each of the four purported to pass all his estate and interest in four eighth parts of the testator's estates to the mortgagee.

With reference to the question raised by some of the Defendants as to the retention of the title deeds by *John Carter* the younger, an affidavit was filed by the Defendants *Aiken* and *Coles*, in which, after denying that they had, at the date of the mortgage to them, any notice of the mortgage of June, 1850, to *John Carter* the elder, they deposed as follows :—
 “ We believe that the title deeds of the properties comprised in the mortgages to the *Chilcotts* and *Prosser* were,

on the occasion of those mortgages being made, handed over by *John Carter* the younger to the solicitor of the *Chilcotts* and *Prosser* respectively. And we have been informed and believe, that such title deeds were at that time in possession of *John Carter* the elder, and that *John Carter* the elder gave such title deeds to *John Carter* the younger, in order to enable *John Carter* the younger to effect the mortgages to the *Chilcotts* and *Prosser* respectively; and that we were, at the time of the execution of the mortgage to us hereinafter mentioned, informed by the solicitor to the *Chilcotts* and *Prosser*, that the title deeds of the property so mortgaged to the *Chilcotts* and *Prosser* respectively, were in their possession respectively, and that he had been informed by *John Carter* the younger, that the said properties were not subject to any other incumbrances than those to the *Chilcotts* and *Prosser* respectively. We say, that we are informed and believe, that *John Carter* the elder, and *John Carter* the younger, immediately after the decease of *Edwin Carter*, were informed, and we believe, by the late *Francis Short*, a solicitor in Bristol, that *Edwin Carter* had made a will later than and revoking the will of the 12th of January, 1846, and that, in the year 1848, *John Carter* the younger was furnished by *Francis Short* with a copy of the said will."

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John Carter the elder was cross-examined with reference to this point, when he deposed as follows :—

"When my son, *Edward Carter*, signed a mortgage to me for 500*l.* I did not ask for the title deeds of the property so mortgaged. Mr. *Short* had them. [Mr. *Short* was the solicitor of the father, *John Carter* the elder, and his sons.] In June, 1850, my sons, *John Carter* the younger, and *Charles Carter*, made a mortgage to me, and the deeds relating to the property so mortgaged by them were not asked for by me—they were then in the hands of Mr.

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Short, as my attorney, and he made the mortgage. They were delivered to Mr. *Short* by my son *John*. Mr. *Short* gave the deeds back to my son *John*, saying it was proper that he should have them as a trustee under the will."

The cause now came on for further consideration.

Argument.

Mr. *Willcock*, Q. C., and Mr. *Amphlett*, for the Plaintiffs, disputed the claim of the Defendant *Prosser*, as a purchaser for valuable consideration without notice, to make use of the legal estate as a protection against their equitable interests under the will. *Jones v. Powles* (a) would be cited in support of her claim; but there the legal term carried no notice of its object, here it was just the contrary—the will—the very instrument on which the Defendant must rely as the ground of her title at law—subjected her to these trusts, and no one could claim under a will and deny the trusts appearing on the face of it: *Saunders v. Dehew* (b).

Mr. *Cairns*, Q. C., and Mr. *C. Roupell*, for the Defendant *John Carter* the elder, and for *Edward Carter* and the assignees in bankruptcy of *George Carter*:—

On behalf of *John Carter* the elder, they disputed the right of all the subsequent mortgagees other than *Anne Prosser*, and of her, except as to the one-eighth to which *James Prosser* had been admitted, to claim priority over his mortgage. A first mortgagee, having the legal title, is not to be postponed merely because he has not possessed himself of the title deeds; fraud or gross negligence must be shewn: *Colyer v. Finch* (c), *Hewitt v. Loosemore* (d).

(a) 3 My. & K. 581.

(b) 2 Vern. 271.

(c) 5 H. L. C. 905.

(d) 9 Hare, 449.

Here there was neither. *John Carter* the elder had, in fact, no right to the deeds as against the mortgagor, who, as trustee for all other parties interested in the will, was entitled to retain them.

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On behalf of the other Defendants for whom they appeared, they contended that there had been no forfeiture of the annuities or of the reversionary interests given by the will to *Edward* and *George*. The Court would not construe words intended to apply to what passed under the earlier will, in which there was no restraint on alienation, as applicable to their interests under a will of which they were totally ignorant, when the only possible result of such a construction would be to work a forfeiture, to which none of the parties could possibly have known that they were liable.

In reference to the question—what passed by the surrender of the copyholds, in which the attorney had exceeded his power, they contended, that the estate to which *Prosser* had been admitted would be restricted to that which the attorney was authorised, and which the parties were entitled, to surrender; the surrender enuring according to the legal title: *Church v. Mundy* (a); and the surrenderee being in, not by the lord, who is merely an instrument, but by him who makes the surrender: *Bunting v. Lepingwell* (b); Scriven on Copyholds, 148, 312; 5 Cruise, Dig. 451.

Mr. C. Barber, for the Defendants *Bromage* and the *Sneads*, supported the contention of *John Carter* the elder, but contended that the annuities and reversionary interests of *Edward*, *George*, and *Charles* were forfeited: those interests being interests given until they committed the acts of forfeiture, not absolute interests cut down by a subsequent proviso: *Yarnold v. Moorhouse* (c).

(a) 12 Ves. 426.

(b) 2 Co. Rep. 355.

(c) 1 Russ. & My. 364.

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Mr. *Batten*, for the Defendants *Aiken* and *Coles*, contended that nothing passed by the mortgage to *Prosser* beyond the one-eighth of the property therein comprised, to which *John Carter* the younger, at the date of that mortgage, believed himself to be entitled.

And, as against *John Carter* the elder and the Defendants *Bromage* and the *Sneads*, he contended, that they had lost their priority by giving back the title deeds to *John Carter* the younger.

Mr. *James*, Q. C., and Mr. *Martindale*, for the Defendant *Ann Prosser*:—

As against the Plaintiffs, we contend, that, *James Prosser*, having by the surrender and admittance to one-eighth of the copyholds in the manor of *Liswerry* and *Libneth*, become seised of the legal estate therein, and having acquired that legal estate for valuable consideration, without notice that the will of January, 1846, had been revoked, the Defendant *Ann Prosser*, as his representative, is entitled to hold that legal estate as against the Plaintiffs, and all annuitants, and all other persons claiming under the subsequent will, until she is redeemed by payment of what is due on her mortgage: *Ex parte Knott* (a), *Jones v. Powles* (b), *Joyce v. De Moleyns* (c). *Prosser* was, in effect, a purchaser for value without notice of these trusts or of the will which created them. He purchased from the person in possession. He acquired the legal estate; and as to the argument of the Plaintiffs, that the instrument upon which his title to that legal estate depends, affords direct notice of these trusts, his conscience is not affected by that circumstance. He acquired the legal estate without fraud, either on his part or on that of the vendor,—he acquired it by mistake, as it were, and by accident; and

(a) 11 Ves. 609.

(b) 3 My. & K. 581.

(c) 2 Jones & Lat. 374.

his conscience not being affected, how can the Plaintiffs deprive him of any of the consequences which at law would result from that possession.

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Then, as against *John Carter* the elder and his sub-mortgagees, we claim priority :—

First, on the ground of estoppel :—the mortgage to *Prosser* of September, 1852, recited that the will of January, 1846, was the last will of the testator ; that the testator died without having revoked or altered it ; and that, under that will, the testator's brothers *Alfred*, *George*, and *Charles* were entitled each to one-eighth of the whole of the testator's estates ; and *John Carter* the younger being a party to that deed and allowing his brothers to deal with the mortgagee upon that footing, and to mortgage to him their supposed shares, *John Carter* the younger and all claiming under him are estopped from denying that recital ; and the Defendant *Prosser* is entitled to those three eighths in priority to all persons claiming under *John Carter* the younger by virtue of earlier incumbrances, consequently, as against *John Carter* the elder and his sub-mortgagees : *Bowman v. Taylor* (a), *Young v. Raincock* (b), *Doe dem. Gaisford v. Stone* (c), *Right dem. Jefferys v. Bucknell* (d).

The VICE-CHANCELLOR referred to *Carpenter v. Buller* (e).

Mr. James, Q. C.—The case of *Young v. Raincock* is a more recent decision, and contradicts *Carpenter v. Buller*. That also was a case of ejectment.

The VICE-CHANCELLOR.—An ejectment by the person

(a) 2 Ad. & Ell. 278.
(b) 7 C. B. 310.
(c) 3 C. B. 178.

(d) 2 B. & Ad. 278.
(e) 8 M. & W. 209.

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setting up his right on the deed in which the fact was recited. But that is not inconsistent with what Baron Parke says in *Carpenter v. Buller*. He says, there can be no estoppel except in an action brought on the footing of the deed.

Mr. James, Q. C.—But independently of that ground, we claim, *secondly*, on the ground that *John Carter* the elder, after the mortgage to him, gave back the title deeds to *John Carter* the younger, and thereby enabled him to deliver to *Prosser* such of the deeds as related to the property comprised in the mortgage to him of September, 1852, *Prosser* having no notice of the prior mortgage to *John Carter* the elder. Under these circumstances, *John Carter* the elder and the Defendants *Bromage* and the *Sneads* have lost their priority, and, as to the estates comprised in the mortgage to *Prosser*, must be postponed to that security; and the Defendant *Anne Prosser* is entitled to retain the deeds: *Waldron v. Sloper* (a).

As against the Defendants *Aiken* and *Coles*, the Defendant *Anne Prosser* is clearly entitled to be declared to be the prior incumbrancer upon all the four-eighths comprised in the mortgage to *James Prosser*. A mortgagor is bound to make good, out of whatever estate he has, the interest which he purports to pass in the property comprised in the mortgage: *Noel v. Bewley* (b), *Jones v. Kearney* (c); and here the deed expressly passes not only all his one-eighth, but “all his estate, &c. in the premises,” that is, in the remaining three-eighths, which he supposed to be vested in his brothers.

Mr. Karslake, for the *Chilcotts*, supported the contention that the annuities and reversionary interests had been forfeited, although the parties to whom they were devised were ignorant of the clause which worked a forfeiture. He also

(a) 1 Drew. 193. (b) 8 Sim. 103. (c) 1 D. & Warr. 158.

contended, that the omission of *John Carter* the elder to repossess himself of the deeds, if it did not amount to fraud, was at all events such negligence as this Court would discourage. Upon the question, what passed by the mortgages to his clients, he cited *Drew v. The Earl of Norbury* (a), and *Johnson v. Webster* (b), to shew that the words "all the estate" pass every estate vested in the conveying party, although not vested in him in the character in which he becomes a party to the deed.

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Mr. *Briggs* for the Defendant *Tiley*.

Mr. *Osborne* for the assignees in bankruptcy of *John Carter* the younger and *Charles Carter*.

Mr. *Willcock*, Q. C., replied on the question of estoppel, citing *Stroughill v. Buck* (c).

Mr. *Cairns*, Q. C., replied on the question of forfeiture.

The Court reserved judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

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 —
Judgment.

The circumstances of this case are very singular; and after much examination I have not been able to find any authority precisely in point as regards the principal question which was argued.

The circumstances are these: the testator made a will in January, 1846, by which he devised all his real and personal property, subject to an annuity thereby given to his mother during her life, to his brothers and sisters, eight in

(a) 3 Jones & Lat. 267.

(b) 4 De G., M., & G. 474.

(c) 14 Q. B. 781.

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setting up his right on the ground that it was among them; the consequence was, that if that will stood, that, *Parke* says in *Carper*, the property would have been vested in the brothers and sisters by the deed.

It is, however, although it was not discovered by Mr. *Jam*, all the transactions in question in the cause, claim, &c. will, notwithstanding it was proved and acted up after a long period as the last will of the testator, was not *John*'s last will; and that the real last will of the testator was one of a totally different character, by which he devised all his estates to three trustees, of whom his brother *John Carter* the younger was one, and the others disclaimed, upon trust, subject to an annuity for his mother during her life, and subject to certain other annuities for his brothers and sisters which were to cease on alienation, for his brother *John Carter* the younger, during his life; after which there were divers trust estates over, for the benefit of the children of *John Carter* the younger and other persons.

In the meantime, previously to the discovery of the real last will, and while it was supposed that the first will was operative, various deeds were executed by several of the testator's brothers, with the view of passing or charging their assumed interests under the first will; and in reference to these, I may premise, that, although fraud was suggested, none has been established, nor do I apprehend, after all the consideration that I have been able to give to the question, that it would have made any material difference if I had assumed, which I am not entitled to do, that *John Carter* the younger had knowledge of the existence of the second will at the time of the several transactions mentioned to have taken place on his part. However, upon the evidence before me, I cannot hold that he had any such knowledge, and I must assume that all was done *bonâ fide* on his part.

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As in question are stated in detail in the
decree, and appear to stand thus:—The
v *John Carter* the younger, was one
of his supposed one-eighth of the free-
hold and leasehold estates of the testator, and all
estate and interest therein, whatever it might be,
as father, *John Carter* the elder. That mortgage is
now vested by way of sub-mortgage in the Defendants
Bromage and the *Sneads*.

The next incumbrance in order of date with reference to
the copyhold property, is that created by the deed of the
10th of September, 1852, in favour of *James Prosser*, whose
representative *Anne Prosser* now claims the benefit of it.
By that deed *John Carter* the younger, with three of his
brothers, after reciting the supposed last will of the testator,
and that the testator died without having revoked that will,
conveyed four eighth parts of the testator's freehold estates,
and covenanted to surrender four eighth parts of a portion of
the copyhold estates in favour of the mortgagee. With re-
gard to the freeholds, of course, no question arises as to
priority. The legal estate in the freeholds being outstand-
ing in *John Carter* the elder, (subject to an observation
I shall make presently in reference to a question which was
raised in consequence of his having, as it was alleged,
given back the title deeds to *John Carter* the younger,) no
question arises as to them. But with regard to the copy-
holds there was the covenant I have mentioned; and each
of the four brothers executed a power of attorney to make
a surrender of his eighth part of the copyholds. The at-
torney exceeded his power, but that was admitted by Mr.
James to be a matter on which he could not rely; and the
consequence was, that, had the will of January, 1846, re-
mained unrevoked, the separate eighth part or share of each
of the four brothers would have passed to *James Prosser*.

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The next incumbrance to which it is necessary to advert with reference to the question of priorities is, the charge created in favour of *Tiley*, which is the first charge on the leasehold interest in the tithe rentcharge and tithe leaseholds.

Subject to these incumbrances, certain other charges were created in favour of the *Chilcotts*, who came in after all the various charges to which I have referred.

The great and important question as far as the Defendant *Prosser* is concerned is this:—it was contended, and I think rightly contended, that all the actual estate and interest, whether legal or equitable, of *John Carter* in the four eighth parts of the estates comprised in the mortgage to *Prosser* must have passed by that conveyance. As to that, I apprehend that no reasonable doubt could have been suggested, even if I had been referred to a case, which, in the course of this inquiry, and looking through all the authorities on the subject, I have had occasion to examine, a case with which much fault is found by Lord *St. Leonards*(a), I allude to that of *Fausset v. Carpenter*(b) in the House of Lords.

That case, at the hearing of which only two learned Lords were present, Lord *Tenterden* and Lord *Wynford*, came before the House upon a writ of error, and the question was as to the legal effect of a conveyance in which the parties to the conveyance were thus situated:—One, whose name was *Palmer*, happened to be a trustee under the marriage settlement of another of the parties to the conveyance, named *Catherine Newcomen*. He also, in right of his wife, a sister of *Catherine Newcomen*, had himself a beneficial

(a) Treatise of the Law of House of Lords, pp. 76—83.
 Property as administered by the (b) 2 Dow & Cl. 232.

interest in one third part of the property. A sale was made of all the three parts to a purchaser; all the parties executed the conveyance, *Catherine* and *Palmer* conveying at the same time; and the House of Lords held that the effect of the deed was not to pass in law the interest which *Palmer* held as trustee under *Catherine's* settlement.

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That decision, no doubt, has occasioned considerable perplexity, and, as Lord *St. Leonards* observes, it was a subject of consideration whether it would not be advisable to bring in a short Act of Parliament to reverse it. But that course was never taken; and, if the present case were like that of *Fausset v. Carpenter*, I should hold myself to be bound by it.

One analogy, indeed, on which the House proceeded in saying that a devise of real estates, with charges created upon these real estates, will not pass such estates as are held by the testator on trust, might possibly have been a ground for supporting the decision, if the circumstances had been simply that *Palmer* had only a beneficial interest in one capacity, and in the other nothing but a trust estate. But there was this additional circumstance, which was possibly overlooked, but which appears to occasion an insuperable difficulty in supporting the judgment, notwithstanding the high authority of the Court which pronounced it, namely, that the very lady for whom *Palmer* was trustee, was one of the parties to the conveyance, and intended to pass her beneficial interest by the conveyance; yet, according to the doctrine of the House of Lords, the purchaser did not acquire the legal interest, although the trustee and the cestui que trust had joined in the conveyance. That is a difficulty that must be found to be very great if the case can ever be reconsidered.

In this case no such question arises, because, even if you

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are allowed to say a mere legal estate did not pass by that which purported to pass, for valuable consideration, a property in which the conveying party had a beneficial interest; yet *John Carter* the younger had a beneficial interest for life under the second will of the testator, as well as the legal estate; and therefore it seems impossible to hold that the whole of his estate and interest, whether legal or equitable, in the four eighth parts in question did not pass by the mortgage to *Prosser*.

Holding, therefore, as I do, that the whole of that interest passed, and that *James Prosser* by the surrender and admittance acquired the legal estate in fee in one eighth part of the copyholds to which he was so admitted, the really serious question, which was extremely ably argued by Mr. *James*, is this:—What ought to be the result of his thus obtaining the legal estate accidentally (if I may so term it), and certainly without notice in point of fact of the trusts upon which the legal estate was held.

In considering this question, I have had occasion to look through the whole class of authorities with reference to the protection which this Court affords to purchasers without notice. The cases have gone to a very considerable length unquestionably—the earlier cases, perhaps, to a greater length than would be supported by more modern decisions. One of the earlier cases is cited in *Vernon* as *Sir John Fagg's case* (a), and is reported in 1st Chancery Cases, under the name of *Sherly v. Fagg* (b), but without the circumstances, mentioned in the narrative of the case in *Vernon*, of the actual fraud which appears to have existed, and according to which the case is an authority to the full extent, that even an advantage obtained by fraud on the part of a purchaser without notice would be supported in order

(a) 1 Vern. 52, 53.

(b) 1 Chanc. Cas. 68. Compare 2 Vern. 701, n. 2.

to maintain his title. *Vernon* in narrating the case, states that *Sir John Fagg*, being a purchaser, came into a man's study, and there laid hands on a statute that would have fallen on his estate, and put it up in his pocket—evidently without any authority—in fact stole it, and nevertheless, having thereby obtained an advantage in law, he was protected in the possession of that deed. The facts, as to how he obtained possession of the deed, do not appear as the case is narrated in the more full report in 1st Chancery Cases, and I should apprehend it is sufficiently clear, that a case to such an extent as that would never be upheld.

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There are several cases in *Vernon* which go very far—cases some of which are reported, while others are merely referred to in the course of the discussion. In one, there was clearly no title existing at all, as the law then regarded it, the title being merely a parliamentary title during the usurpation. Nevertheless, the purchaser was held to be protected; having got the legal estate, he was not interfered with by this Court. There are other cases of that description.

An early case occurs in *Viner*, which shews the great length to which the doctrine has been carried. It is that of *Turner v. Buck* (a), argued by *Sir Joseph Jekyll*, before Lord *Cowper*. The case is narrated very shortly. The Defendant had purchased of a person who in effect was held to be in possession as a mere disseisor. He had taken a conveyance without notice of any other title; and afterwards, the disseisee being a trustee, the cestui que trust applied to this Court to compel the disseisee, his trustee, either to convey to him the legal estate—probably it would have been difficult to compel a conveyance in consequence of its being

(a) 22 Vin. Abr. 21.

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turned to a mere right of entry—or to proceed in ejectment to recover the estate, or to allow him, the cestui que trust, to proceed in his name. The Court refused to make the decree. The Defendant being a purchaser without notice, the Court said it would not give relief against him by compelling the disseisee to take any of the steps in question. That case has gone as far as any I can find determined.

There are numerous cases in which persons, purchasers for value, and getting possession of the deeds in a legitimate manner, have been held protected. *Wallwyn v. Lee* (a) was a case of that kind. There, a mortgage had been created by the settlor, who was simply a tenant for life under the settlement, and after his death the tenant in tail in possession applied to this Court for a discovery and delivery of the title deeds, which, he insisted, must be regarded as unduly in the possession of the mortgagee, he having no interest in the estate. But Lord *Eldon*, after considerable deliberation, held that the Court would not interfere to that extent, that the mortgagee was to be protected in the advantage he had gained by obtaining possession of the deeds, and that no course could be taken against him, inasmuch as he was a purchaser for valuable consideration without notice.

A case was cited before me in argument, where a good many of the decisions I have mentioned may be found. The case of *Jones v. Powles* (b), before Sir *John Leach*, which was a case of the grossest description as regards the vendor. The vendor had forged a will and sold under the forged title. He then found out that there was a satisfied mortgage. The mortgage having been satisfied, the mortgagee was, of course, a trustee for the true owner of the estate. The vendor, who knew he was not owner of the

(a) 9 Ves. 24.

(b) 3 Myl. & K. 581.

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estate, procured the mortgagee to convey to the purchaser; and the purchaser under that instrument, who originally took no estate or interest, was held nevertheless to be entitled to retain the estate. Sir *John Leach* laid it down (and I apprehend that he did not exceed the authorities referred to in that case when he so laid it down,) that a purchaser from a person in possession purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from the trustee of a satisfied term or the mortgagee of a satisfied mortgage, will always be protected in this Court against a prior incumbrancer or cestui que trust, subject only to one observation which has considerable bearing on the case before me—an observation to be found in Lord *Eldon's* remarks in *Maundrell v. Maundrell* (a), and repeated by him in *Ex parte Knott* (b) and several other cases—which is this, that the party so conveying the legal estate must not have notice of an express prior trust or incumbrance. On looking through the authorities, you find that, where a conveyance is to be obtained from a mortgagee who has become a constructive trustee by the mortgage being satisfied, or from a trustee of a term to attend on the inheritance, the question who is or is not entitled to the equity of redemption or to the inheritance may be a question that may affect him as to the conveyance he may make; but, at the same time, there is no direct notice afforded by the document in the hands of the trustee or mortgagee of any ulterior trust beyond this, that he is to hold for the persons entitled. In *Maundrell v. Maundrell* and again in *Ex parte Knott*, Lord *Eldon* discusses the whole doctrine, to which, he says, he has considerable aversion, and searches with great jealousy into the cases, and he says he has not been able to find a case where a person being a mortgagee without notice of a previous incumbrance, has been held to be entitled to obtain from the

(a) 10 Ves. 246.

(b) 11 Ves. 609.

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turned to a mere right of entry—
 to recover the estate, or to allow
 to proceed in his name. The
 decree. The Defendant. I have not been
 the Court said it would. I speak of cases
 pelling the disseiser. Case of a mortgagee whose
 That case has gone. the dry trust of a satisfied

There are. There is nothing but the trust remaining
 for value, &c. There are several cases where the pur-
 manner. been allowed at the last moment, after payment
 a case and up to decree, to get in an earlier mortgage; and
 by is no breach of duty in a person assigning his mort-
 ge to anybody who pays him. Any purchaser is entitled
 to hold that which, without breach of duty, has been con-
 veyed to him. But the case put by Lord Eldon is this:
 —Could the purchaser insist on any benefit to be derived
 from that which would be a breach of duty or breach of
 trust in the trustee? In *Ex parte Knott* he says, "Surely,
 if the purchaser would be safe,"—if the purchaser would
 be entitled to hold the estate discharged of the trust,—
 "the trustee ought to be so." The trustee should be pro-
 tected in the act which he has committed (a). Whether
 that doctrine will ultimately be held, it is not perhaps
 important for me, at present, to say; but I must say, on
 looking through a vast number of volumes of the earlier
 and later authorities, I have not found any such case as
 Lord Eldon has put—I have not found any case in which
 a purchaser, obtaining a conveyance of a mere dry trust
 estate from a trustee of a satisfied term, or from a mort-
 gagee whose mortgage has been satisfied, such trustee or
 mortgagee having at the time when he made the conveyance
 notice of an intervening charge or trust, has been held

(a) 11 Ves. 614.

himself from such charge or trust by
which he has so obtained.

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There is one of a different cha-
racter throughout the authorities.
In no instance no difference between
that of *Jones v. Powles*, in which a
purchaser, whatever, or, what is worse, having him-
self no title, asks the holder of a mortgaged term,
if the mortgage has been satisfied, to convey it to the
purchaser, and yet the Court gives the purchaser the
benefit of that term, when it is clear the term itself is only
held for the benefit of those entitled to the inheritance.
But here, the purchaser taking the conveyance under
one will, supposed by all parties to be really the last
will of the testator, finds himself driven to rely upon another
and a second will, containing on the face of it all the trusts
which the testator has created. In that point of view, I
certainly have found no case analogous to this. The case
cited in argument of *Saunders v. Dehew* (a) is a case of a dif-
ferent description, bearing some resemblance to the case put
by Lord Eldon in *Maundrell v. Maundrell*. In *Saunders*
v. Dehew, it was held, that, although it had then long been
settled, that a second incumbrancer has a right, at any
period, however long, after notice of a prior incumbrance,
to get in any outstanding estate which can be bonâ fide
assigned to him, such as that of a prior mortgagee, whose
mortgage he pays off, and who has no notice of the incum-
brance; yet he cannot, after notice, take a conveyance of a
legal estate held upon express trusts, and then claim to pro-
tect himself thereby from the trusts upon which it is so
held. It was argued, that, having no notice of those trusts
at the time of making the advance, no notice of the instru-

(a) 2 Vern. 271.

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ment creating the trusts, he is a bonâ fide purchaser without notice for valuable consideration,—but finding that there are such trusts, he gets the party who holds the trust estate to hand over that estate to him:—a case very similar to that put by Lord *Eldon*, where the trustee, who has knowledge who is his cestui que trust, makes a title to the purchaser for value. But it was held that a transaction of that kind could not be supported. That stands, however, on different grounds from the case before me, inasmuch as it would be a fraudulent combination of the two—the purchaser and the trustee. The purchaser, to save himself, would be inducing the trustee to commit a fraudulent breach of trust.

The case of *Saunders v. Dehew* has been followed in a case of *Allen v. Knight* (a), before Vice-Chancellor *Wigram*, affirmed on appeal by Lord *Cottenham* (b).

That is the extent of the authorities I have yet found on the subject resulting in this distinction, that, although you may get in any outstanding legal estate which a person may bonâ fide assign to you, you having notice of the intervening incumbrance, he not having any such notice, you cannot procure a conveyance from a trustee who himself has an adverse duty to perform, and who by such a conveyance would, in fact, be making over the estate to you to protect you against the very interests which it was his duty to protect. That is so rational, that one wonders the question should have arisen twice.

But in this case it is an admitted fact, that *James Prosser*, when he purchased and took his conveyance, had no notice of the second will. I must take it, on the evidence, that the seller also had no notice. They intended the one to pass and

(a) 5 Hare, 272.

(b) 11 Jurist, 527.

the other to take the interest of *John Carter* the younger under the supposed last will. I have already held that the interest which he took under the real last will passed. And now comes this question, which seems to me to be one of very great importance, and I confess I felt much pressed by the very able view in which *Mr. James* presented it to me, but which I have not been able to satisfy my mind is the correct view. He says, "I was a purchaser for value without notice; I plead purchase for value without notice." Lord *Eldon* says, in *Walwyn v. Lee*, you must plead that the vendor was in possession (the question there was, whether it was necessary to shew that the mortgagee had taken possession), you must plead possession to make out that you purchased for valuable consideration without notice. Accordingly, *Mr. James* puts it in this way. He says, "I might plead I took a conveyance from a person in possession; I find myself in possession of the legal estate, and how can a Court of equity interfere to deprive me of the benefit of the legal estate?" But the only legal estate he can avail himself of is a legal estate under a conveyance, which, on the very face of it, betrays the trust; and the question is, whether, if you are obliged to say, "I have no other conveyance than this: this is my legal title," such a legal title can be held a protection from the claims of the cestuis que trustent. In other words, on a bill filed by the cestuis que trustent for the execution of the trusts of the will, can any purchaser plead a purchase of the trustee's legal estate without notice of the trusts; because the trustee affected to convey a different estate from that which he in fact conveyed.

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Now, no case has ever been brought up to that; and looking to the distinction drawn between the case of a trust expressed on the face of the instrument, and cases where there is merely the general direction to hold in trust for

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the persons ultimately to be entitled—two cases of an extremely different character—it does not appear to me, that, if you are driven to rely for your title on that which on the very face of it when produced discloses the equitable interests, you can be heard to say, “I claim the estate under this instrument, and I disclaim every charge that appears upon the face of it; or aver ignorance of the deed which constitutes your title.”

So far from thinking it an easy or simple case, I confess I have thought it a case of considerable doubt and difficulty, novel altogether in its circumstances, and of course open to this observation, that it may be said that equity can only fasten upon the conscience. *Prosser* says, “I have got the legal estate, and although it is a legal estate created by the instrument which affords direct notice of these trusts nevertheless, my conscience was unaffected by them. Before I knew the contents of the will, I got the estate by mistake and by accident, and I am unaffected by these trusts; my conscience being unaffected, how can you fasten upon me any trusts declared of the legal estate so vested?” It seems to me, nevertheless, that where, as here, a person is driven to the necessity of saying, “What I rely on is the fact of my having acquired the legal estate under this will; at the execution of my mortgage, what passed to me was the estate vested in the mortgagor under this will”—the answer is, that the moment you look to see what estate is vested in the purchaser under the will, you see also the trusts to which it is subject; the very same instrument which he is obliged to produce to make out his title, is the identical instrument describing the trusts that may be enforced against him.

As to the doctrine of estoppel, the second point *Mr. James* relied upon, that is clearly disposed of by the case of

Carpenter v. Buller (a), which lays down distinctly the effect of estoppel, and shews that the mistake has long since been corrected at law, which was fallen into here, of supposing that the deed itself could operate as an estoppel in all actions. An estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action there can be no estoppel, as Baron *Parke* puts it in *Carpenter v. Buller*. He says, "If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord *Coke* says on the matter of recital in Co. Litt. 352, b. ; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is found in the case of *Lainson v. Tremere* (b), where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.*, and the Defendant was estopped from pleading that it was 140*l.* only, and that such amount had been paid. So, where other particular facts are mentioned in a condition to a bond." Then he adds, "By his contract in the instrument itself, a party is assuredly bound and must fulfil it. But there is no authority to shew that a party to the instrument would be estopped in an action by the other party, *not founded on the deed and wholly collateral to it*, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the Plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts."

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(a) 8 M. & W. 209.

(b) 1 Ad. & Ell. 292.

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Here, in this case, I assume ejectment to be brought by *John Carter* the younger, or those claiming under him, in respect of the shares of the other three brothers. That action being a matter wholly collateral to this deed, and not an action upon the deed, the deed would only be evidence and no estoppel. It is an ingenious point to suggest, but I think it is sufficiently clear. The other point, I thought far from clear, and it is not until after great consideration that I have come to the view I take of it.

Those were the two main points in the case; but there was a third point which is worthy of some consideration, all the rest was comparatively simple. It was, whether *John Carter*, the father, had not lost his priority by giving back the title deeds to his son who made the mortgage.

In reference to this point, I may take it as conclusively settled, that, in order to postpone any party to a cause in respect of a prior mortgage or incumbrance, the onus is on the party claiming, of showing not merely that he has got the title deeds—of course that he can easily show—but that he has got them through gross negligence on the part of the person he seeks to postpone. In *Allen v. Knight* (a), the deeds had got into the hands of the wrong party; but there was no evidence how they got there. They were in the hands of the mortgagor (but how, there was no evidence on either side) and he parted with them; and Vice-Chancellor *Wigram* first, and Lord *Cottenham* afterwards (b), held, that the burthen of proof was on the person asking to postpone the other, and no gross negligence would be assumed from the mere fact of possession. In *Colyer v. Finch* (c), before the House of Lords, the doctrine has been fully and completely settled, as it appears to me; and Vice-Chancellor *Turner*, in

(a) 5 Hare, 272.

(b) S. C., 11 Jur. 537.

(c) 5 H. L. C. 905.

Hewitt v. Loosemore(a), lays down the doctrine in a manner which, if I may venture to say so, is a clear and precise mode of stating it, viz., that there must be gross negligence. But even then, according to *Allen v. Knight*, you are bound to shew that no inquiry was made—to extract, if you can, by examination or otherwise, the admission that no inquiry was made—because in *Allen v. Knight* it was said, that, where there was no evidence one way or the other, the Court would not presume that no inquiry was made.

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In the case before me the evidence is simply this, the question arising between co-defendants there is no direct evidence either way as to the circumstances under which the deeds were left; but two of the subsequent mortgagees, *Aiken* and *Coles*, make this affidavit:

[His Honour read the affidavit as above(b)].

So that they charge distinct fraud against *John Carter* the younger. It is not proved, their evidence is only that they are informed and believe, and there is no evidence whatever of the truth of what they say. The effect, therefore, is merely to tender an issue; but how do they put their issue? Their issue is, that *Short* knew of the other will. Then what do they extract from *Carter* the elder, on cross-examining him. They only extract this:

[The VICE-CHANCELLOR read the result of the cross-examination(c).]

If *Short* had said that truly, it was quite a sufficient reason for giving back the deeds. It may make Mr. *Short's* case a very bad one; but if the deeds were given back to *John Carter* the younger as trustee, he had a right to retain them; under the last will he was trustee of the property, and as such he was the right person to hold the

(a) 9 Hare, 449. (b) Vide supra, p. 624. (c) Vide supra, p. 625.

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deeds. In *Farrow v. Rees*(a), it was held, that, where an estate is vested in trustees, subject to a term for securing a jointure and for raising portions, and the tenant for life mortgages his interest, the mortgagee shall not be postponed merely on the ground that he has not obtained possession of the deeds; for although a tenant for life has the custody of the deeds, nevertheless, there being a term for securing a jointure, or for raising portions, the trustees have a right to prohibit his parting with them.

Even if I am to take the case as it would have stood if the interests of the parties had been such as they supposed them to be under the earlier will, although I am not obliged so to take it, yet I have a strong inclination of opinion, that, where there are title deeds belonging to several tenants in common, and one mortgages his share, it would not be an act of gross negligence in the mortgagee to hand him back the deeds; and here, according to Mr. *Carter's* evidence, he says the deeds were in the hands of his solicitor for preparing the mortgage, and when the mortgage was prepared they were handed back. If called upon to decide the point, I think it would be impossible for me to hold that there was such gross negligence on the part of *John Carter* the elder in not retaining the deeds upon his taking the mortgage of what he supposed to be one-eighth of the property as to amount to fraud. However, I do not think the case can be put so high as that, for, if *Short* had notice of the subsequent will, or suspected it, he handed them rightly back to the son, and it would have been wrong in the father to retain them.

That disposes of the main questions in the cause. A minor point remains to be disposed of: as to what is the effect of the several incumbrances made by the three brothers, *Edward, George, and Charles*.

As regards *George* and *Charles*, the incumbrances executed by them purport to pass, not only their supposed interests under the will of January, 1846, but all their interests in the testator's estates. As regards *George* and *Charles*, therefore, I hold that the deeds so executed by them passed all the interest to which they were entitled under the real last will of the testator; consequently, that they passed all the arrears of the annuities due to *George* and *Charles* respectively, when such deeds respectively were executed by them; and that, upon their executing those deeds, their interests under the last will of the testator ceased.

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But, as regards *Edward*, the certificate only finds that he executed a deed, dated 1854, by which he purports to convey and assign, and covenants to surrender, all his parts or shares of and in all the estates which passed by the will of January, 1846, which is not now the real will, and under which, therefore, nothing passed; after which the deed contains the words, "and all his estate, interest, &c., of, in, to, or out of the same hereditaments and premises *hereby granted and assigned, and covenanted to be surrendered.*" I cannot upon that hold that he has passed his interest under the real last will.

However, as the certificate states that several other deeds were executed by *Edward* which are not in evidence, there must be an inquiry about that. As regards the other brothers, I am clear that their interests have ceased; but as regards *Edward*, as to whom I only find that he has executed some deeds of which I know nothing, I cannot say that his interest has determined.

Upon the cause coming on to be spoken to upon the Minutes, it appeared, that, by an indenture, dated the 23rd

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of January, 1850, *Edward Carter* had purported to pass all his estate and interest in the testator's estates generally.

The following order was then made:—

DECLARE that the Defendant, *Ann Prosser*, as administratrix of *John Prosser* deceased, is by virtue of the surrender to the said *James Prosser*, dated the 4th of December, 1852, and of his admittance, dated the 22nd of December, 1854, the first incumbrancer on the life interest of the Defendant *John Carter* the younger in one undivided eighth part of the copyhold estates of the testator *Edwin Carter*, to which the said *James Prosser* was admitted by the said admittance, but subject nevertheless to the prior trusts of the will. Declare, that the said *James Prosser* was a trustee of the legal estate of the said one-eighth of the said copyhold estates for the purposes of the said will. Declare, that *William Tiley* is, by virtue of the assignment, dated the 21st of November, 1854, the first incumbrancer on the life interest of the Defendant *John Carter* the younger in the renewed lease of the testator's tithe rentcharge of the chapelry of *St. Lawrence* and other premises therein comprised, without prejudice to any further claim which he may be advised to make with respect to the said assignment. Declare, that the defendants *Bromage* and the *Sneads*, as the sub-mortgagees of the Defendant *John Carter* the elder, are, by virtue of the indentures of the 1st of June, 1850, and the 13th of April, 1855, the first incumbrancers on the life estate of the Defendant *John Carter* the younger, in all the freehold, copyhold, and leasehold estates of the testator, other than the said one-eighth of the said copyhold estates, and the said tithe rentcharge and other premises of which the said *William Tiley* is declared to be the first incumbrancer, but subject, nevertheless, to the prior trusts of the will. Declare, that the said Defendants *Bromage* and the *Sneads* are trustees of the legal estate in the said freehold, copyhold, and leasehold estates, on which they are hereinbefore declared to be the first incumbrancers, for the purposes of the said will. Declare, that the said *Bromage* and the said *Sneads* are by virtue of the same indenture the second incumbrancers on the life interest of the said *John Carter* the younger, on the said one-eighth of the copyhold estates, and on the leasehold premises of which the said *William Tiley* is declared to be the first incumbrancer. Declare, that the Defendant *John Carter* the elder is, by virtue of the said indenture of the 1st of June, 1850, the next incumbrancer on the life interest of the Defendant *John Carter* the younger, in all the freehold, copyhold, and leasehold estates of

which the said *Bromage* and the *Sneads* are hereinbefore declared to be the first and second incumbrancers, but subject nevertheless as aforesaid. Declare, that the priority of the other incumbrancers on the life interest of the Defendant *John Carter* the younger under the will is as mentioned in the certificate.

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Declare, that the annuities given by the will to the testator's brothers *George* and *Charles* respectively, and their reversionary life interests in the said freehold, copyhold, and leasehold estates of the testator, ceased from the dates of the indentures [*specifying the dates of the indentures by which they purported to pass their shares,*] and that the arrears (if any) then due of their said annuities were assigned by the last-mentioned indentures. And it appearing that the indenture of the 23rd of January, 1850, would, but for the condition against alienation in the will contained, have had the effect of giving the benefit of *Edward Carter's* annuity and reversionary life interest to the Defendant *John Carter* the elder—Declare that the said annuity and reversionary life interest of the said *Edward Carter* ceased from the date of the last-mentioned indenture; and that the arrears (if any) then due of his said annuity were assigned thereby to the said *John Carter* the elder

Appoint new trustees.

Order sale of so much of testator's freehold, copyhold, and leasehold estates as may be necessary to raise the amount of the said costs and the arrears of the annuities.

And it appearing that *James Prosser* in his lifetime, and the *Chilcotts*, *Tiley*, *Bromage*, the *Sneads*, *Aiken*, and *Colas*, having been served with notice of the decree, obtained orders for liberty to attend the proceedings under the decree, and that they attended and took the benefit of the decree—Order *Ann Prosser* and the *Chilcotts* to deliver up on oath to the new trustees, as the trustees of the will, the title deeds and muniments of title relating to the testator's freehold, copyhold, and leasehold estates, which they received from the Defendant *John Carter* the younger upon the occasion of their respective mortgages.

Order *Ann Prosser* and *Bromage*, and the *Sneads* to join in and execute proper conveyances and assignments for vesting the legal estate of such parts (if any) as shall not be sold under this order of the premises of which they are respectively declared to be trustees, to the new trustees upon the trusts of the will.

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June 24th.

WHITE v. CORAM.

*Devise—
Estates in Oc-
cupation of A.
—Fee Simple.*

—
A devise be-
fore 1838 of
“all my es-
tates in the
occupation of
A. in the parish
of B. to C.”
without words
of limitation,
conferred
upon C. the
fee simple.

IN this case, there having been a reference as to title, the Chief Clerk certified that a good title had not been shewn, because a fee simple did not pass to *James Beavis*, under the devise of the testator’s “estates” in the following will, which was one link in the chain of title :—

“This is the last will and testament of me *Thomas Southwood*, of *Pitsminter* in the county of *Somerset*, Esquire: I do hereby give and devise all my estates in the occupation of *John Trood*, in the parishes of *Pitminster* and *Trull*, to my cousin *James Beavis*, if he is living at the time of my death, but if he is dead I give the said estates to *Frederick White* junior, son of *Frederick White* of *Wellington*; also I give unto *Henry Matthews*, a son of *Francis Matthews*, deceased, all my right in possession or reversion in my estates in the parishes of *Huniock* and *Clayhidon*, and *Burnley*, in the parish of *Churchstanton*; also I give unto *Clement Matthews*, also son of the said *Francis Matthews*, all my estates in the parish of *West Buckland*, in the county of *Somerset*; also I give unto *Ann Bush*, wife of *John Bush*, of *Beach*, in the parish of *Bitton*, all my manor and lands in the parish of *Churchstanton*, not before disposed of to the said *Ann Bush*; also I give all my lands in the occupation of *Peter Poole*, *Richard Hone*, *Robert Chard*, and *Robert Hutchings*, in the parish of *Pitminster*, to the said *Ann Bush*; also I give unto my servant, *Ann Bishop*, 500*l.*; also I give to the said *Ann Bishop* for her life, 52*l.* yearly, to be paid to her yearly, by weekly payments, to be paid by my executor hereafter named, out of my estates in the parish of *Angersleigh*; also I give unto *John Billett*, of *Pit-*

minster, 1000*l.* ; also I give to *William Buncombe*, of *Pitminster*, 1000*l.* ; also I give to *John Trood*, my tenant, 1000*l.* ; also I give unto my servant *James Manley*, 1000*l.* ; also I give to *George Gollip*, formerly my apprentice, 500*l.* ; also I give unto *Dorothy Tuck*, my servant, 500*l.* ; also I give unto *Ann Hutchings*, my servant, 500*l.* ; also I give unto *James Coles*, *John Bale*, *William Morgan*, and *James Tozer*, my labourers, 200*l.* each ; also I give unto *John Bradbeer* and *Mary Blackmore*, 100*l.* each. And I do hereby charge all my chattels with the payment of all my debts and legacies, if sufficient, by my executor, within one year after my death ; but if my chattels are not sufficient, then I charge all my lands devised to my executor with the payment thereof. All the rest of my manors, lands, houses, and buildings, advowson, and all my chattels not before disposed of, I give to my faithful servant *Robert Mattock* ; and I do hereby appoint him my sole executor and residuary legatee. In witness whereof, I, the said *Thomas Southwood*, have set my hand and seal, this 13th day of May, 1829."

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This was a motion to vary the certificate.

Mr. *Rolt*, Q. C., and Mr. *Dymond*, for the motion.

Mr. *Daniel*, Q. C. and Mr. *Hanson* contra.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am of opinion, that the devise to *James Bearis* would confer upon him a fee simple. The Courts have leaned very strongly of late against making minute distinctions in questions of this kind. The certificate must be referred back to the Chief Clerk.

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Mr. *Hanson*.—Your Honour's judgment confirms the opinions of Mr. *Preston*, Mr. *Duval*, and several other eminent conveyancers, which have been taken upon this devise.

July 13th
& 15th;
and Aug. 3rd.

THE COMPANY OF PROPRIETORS OF THE
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v.

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COMPANY.

*Companies—
Contracts—
Specific Per-
formance—
Vendor and
Purchaser—
Mandamus—
8 & 9 Vict.
c. 16, s. 97.*

THE Plaintiffs, an incorporated company, were the proprietors of a canal running near and in the same direction with a portion of the line of the Defendants' railway; and in 1846, when the projectors of the railway were applying for their Act, it was manifest that the railway would

Bill by a canal company for specific performance by a railway company of an agreement to purchase the canal for 12,000*l.*, entered into by the projectors of the railway, with a view of obviating *bonâ fide* opposition on the part of the Plaintiffs to Defendants' Act—*Dismissed*, on the ground that there was no agreement under seal, or signed by two of the directors of the railway company as required by the 97th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) notwithstanding the Plaintiffs had, upon the faith of the agreement, withdrawn their opposition, and had further performed their part of the agreement, by obtaining an Act authorising the sale and purchase of the canal, and notwithstanding other circumstances tending to shew part performance, and a *bonâ fide* intention by both parties to complete.

By the Act authorising the sale and purchase of the canal, the Defendants were "authorised and required," with consent of three-fifths of the proprietors present at a special meeting, "to purchase the canal upon such terms and conditions as shall be or may have been agreed upon between the said companies." The proprietors present at a special meeting, duly held and called in every respect as required by the Act, passed a unanimous resolution (afterwards communicated to the Plaintiffs) authorising the directors to purchase the canal for 12,000*l.*, upon such terms and conditions as to them should seem meet.

Held, 1st, that the Act, not referring to the previous imperfect agreement, did not give validity thereto. 2nd, that, notwithstanding the meeting had been held, and the requisite consent of the proprietors obtained, the company were not bound by the words "authorised and required to purchase," inasmuch as the purchase was to be subject to such terms and conditions as should be agreed upon "between the said companies." And the proprietors having referred it to their directors to settle such terms and conditions, the latter could only do so in the mode prescribed by the 97th section of the Companies Clauses Consolidation Act, viz. by an agreement signed by two at least of their number.

Besides, where there is not already an agreement under the company's seal, or signed

materially injure the traffic of the canal. To obviate an opposition which the Plaintiffs were about to make to the passing of the Defendants' Act, and which promised to be to a great extent effectual, a negotiation was entered into by the proprietors of the railway with the Plaintiffs, with a view to the purchase of the Plaintiffs' canal by the Defendants, in the event of their being incorporated. And in February, 1846, the solicitors of the projectors wrote to the Plaintiffs as follows:—" *Shrewsbury & Herefordshire*.—The directors of this railway have had under their consideration the proposal for purchasing the *Leominster* Canal, and after hearing the report of the interview, held yesterday, between your agents and the deputation from this board, they have instructed us to submit the following proposal for the consideration of the Canal Company. The *Shrewsbury and Herefordshire* Company, in the event of their obtaining their Act during the present or following session, offer to purchase the canal, with all property of every description belonging to the Canal Company (except the houses in *Leominster*) at the sum of 12,000*l.* The Canal Company to obtain the sanction of Parliament to the transfer of the canal to the Railway Company, and to its being discontinued as a navigation, if the Railway Company should desire to stop it up. We presume you will submit this without delay to the proprietors of the Canal

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by two of the directors, or where there is any question left open as to the terms or conditions of the agreement, the proper mode of enforcing such a direction in an Act of Parliament is by mandamus, and not by suit for specific performance—*Semle*.

Had the Plaintiffs obtained from the directors a conditional agreement, stipulating, that, in the event of an Act being obtained authorising a sale and purchase of the canal, they would bind the company to carry out the imperfect agreement, then, on the passing of such Act, the company might have been completely and effectively bound—*Obiter*.

All that was decided by the House of Lords in the *Caledonian and Dumbartonshire Railway Company v. The Magistrates of St. Helensburgh* (2 Macqueen, 391) is, that, what directors cannot do after the incorporation of a company, provisional directors cannot do before, for the purpose of binding the shareholders.

Observations on the necessity in dealing with public companies of obtaining agreements drawn up and executed in the most legal, solemn, and binding form; experience showing that in such transactions good faith cannot be relied on.

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Company, and when you have done so, we shall be glad to hear the result."

This proposal was taken into consideration at a special meeting of the proprietors of the Plaintiffs' Company, held in July, 1846; when it was resolved that the proposal should be accepted.

Upon the faith of this transaction, the Plaintiffs withdrew their opposition to the Defendants' Act; and in the same year that Act was passed.

A correspondence then ensued between the solicitors of the Defendants and the solicitors of the Plaintiffs; and a draft agreement was forwarded on behalf of the Plaintiffs to the solicitors of the Defendants, by which, after reciting that during the progress through Parliament of the Defendants' Act, an agreement or undertaking was made or given on behalf of the promoters of the railway for the purchase on the terms therein expressed of the Canal, and that such agreement was on behalf of the Canal Company adopted and confirmed at a special general assembly of the proprietors, it was witnessed, that the Canal Company agreed to sell to the Railway Company, and the Railway Company agreed to purchase, for 12,000*l.* the fee simple and inheritance of the Canal; and that "On the quiet and undisturbed possession for a period of forty years and upwards of the Canal Company of and in the canal and property thereby agreed to be sold being duly and satisfactorily shewn and proved, such title of the Canal Company thereto by possession should be accepted by the Railway Company without any objection. That the said sale or purchase should be completed, and the Railway Company should be let into possession of the canal and property thereby agreed to be sold on the 1st day of Janu-

ary then next ; provided that an Act or Acts of Parliament, sanctioning or authorising the sale and purchase thereby agreed to be made, should have been then obtained, or as soon after that day as any such Act should have been obtained." And it was further thereby agreed, that such Act or Acts of Parliament as might be necessary for sanctioning and confirming the sale and purchase thereby agreed to be made, and authorising the discontinuance of the Canal, and for giving full effect to that agreement, should be applied for in the then present session of Parliament by the Canal Company, with the consent and co-operation of the Railway Company, who should to the utmost of their power promote the success of such application ; and all the costs and expenses of such application should be borne and discharged by the Canal Company and the Railway Company in equal moieties.

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This draft was approved on behalf of the Defendants by their solicitors, and was laid by them before the Directors of the Railway Company ; and at a meeting of the proprietors of the Railway Company, held in February, 1847, a resolution was passed, which was afterwards communicated to the Plaintiffs by the Defendants, "that the Directors be authorised to carry out the arrangements made by them with the proprietors of the *Leominster* Canal Navigation."

An Act of Parliament was then applied for by the Plaintiffs, as provided for by the draft, and was passed, the Defendants signifying their consent by their common seal.

This Act, which was called "The *Leominster* Canal Sale Act, 1847," contained the following recital :—"Whereas the aforesaid Canal, or such portion thereof as is completed, is of little use for the purposes for which the same was intended, and by the construction of the said proposed railway the utility thereof will be further diminished ; and

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it is probable that the proprietors thereof will be no longer able to maintain the same; and the said Railway Company are willing to purchase the said Canal and works and other the property of the said company of proprietors except certain messuages and land in the borough of *Leominster*, and the said company of proprietors are willing to sell the same."

By the 4th section of the Act it was provided as follows: "That it shall be lawful for the said Canal Company to sell, transfer, and dispose of to the said *Shrewsbury & Hereford* Railway Company (which company is hereinafter referred to as the said Railway Company) and the same company are hereby authorised *and required*, with the consent of at least three-fifths of the proprietors in the said Railway Company present at a meeting specially held for the purpose, and called by advertisement inserted for four consecutive weeks in the newspapers of the several counties within which such railway is to be made, and held at a period not less than seven days after the last insertion of such advertisement, to purchase the said Canal, called 'The *Leominster* Canal,' or such portions thereof as have been constructed, and the reservoirs, aqueducts, towing paths, houses, and other buildings, wharfs, works, lands, powers, authorities, easements, and privileges belonging to or vested in the said Canal Company, and all other property whatsoever, whether real, personal, or mixed, of the same company, save only certain hereditaments in the Act specified; and such sale or other disposition may be made subject to all or any liabilities and incumbrances charged upon or affecting the same canal and premises, and which shall not be agreed to be, and shall accordingly be discharged or provided out of the purchase money and other funds of the said Canal Company, and generally upon such other terms and conditions in every particular, and with and subject to such

provisions and stipulations as shall be or may have been agreed upon between the said companies."

The expenses attending the obtaining this Act, (1818. 11s.) were discharged by the Plaintiffs and the Defendants in equal moieties, as expressed in the draft agreement.

In June, 1852, the directors of the railway company inserted advertisements in the newspapers, conformably to the provisions of the Act, calling a special meeting for the purpose of authorising the purchase by the company of the *Leominster* Canal. This meeting was held on the 7th of July, 1852, when the following resolution was passed:—"That the directors of the company be and they are hereby authorised, by and with the consent of the proprietors present at this meeting, to purchase the *Leominster* Canal for 12,000*l.* at such time, and upon such terms and conditions, and with and subject to such provisions and stipulations as to them shall seem meet."

On the 8th of July, 1852, the secretary of the Railway Company wrote to the Plaintiffs' solicitors:—"I beg to inform you, that, at the special meeting held yesterday, a resolution was passed authorising the directors to complete the purchase of the *Leominster* Canal."

A correspondence then took place with respect to the title to the property, in consequence of the Plaintiffs not having any documents of title, but merely a title by adverse possession for upwards of forty years. The Defendants took the opinion of counsel upon this question; and, in August, 1854, the Defendants' solicitor wrote to the Plaintiffs' solicitor, as follows:—"I consulted the directors in this case, as I promised when I had last the pleasure of seeing you, and reported to them the opinion of Mr. *Allnutt*, that the Canal had not made, and it appeared could not make, a title at

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all satisfactory to his mind. The directors, however, under all the circumstances, are disposed to accept such conveyance as can be made, and to pay the sum agreed upon as soon as the amount can be realised by sale of shares on hand without serious loss. The position of the company as to its unappropriated capital is fully explained in the report at the last half yearly meeting, and from which you will see that we shall not be in funds until the shares on hand are taken up. The directors feel, that, to issue at the present market price, would be an undue sacrifice, which they would not be justified in making."

The bill prayed specific performance of the agreement for the purchase of the Canal, and that it might be declared that the Defendants had accepted the Plaintiffs' title to the property.

The Defendants, by their answer, insisted, *first*, that the agreement (if any) between them and the Plaintiffs was not one of which this Court could enforce specific performance, or which the Defendants were bound to perform; *secondly*, that, under the circumstances, they had not accepted the Plaintiffs' title, but had a right, should they choose to perform the agreement, to a good title, as usual between vendor and purchaser.

Argument.

Mr. Daniel, Q. C., Mr. Dickinson, and Mr. Stallard for the Plaintiffs :—

This contract is one of which this Court will enforce specific performance.

The object sought by the Defendants in entering into the contract in question was a legitimate object, and it was an

object most material for the purposes of their railway: they wanted the Plaintiffs' traffic; they wanted still more to obviate the opposition which, as the evidence shews, the Plaintiffs were about to make to the passing of the Defendants' Bill, and which had every prospect of proving effectual. The terms on which these advantages were to be obtained under the contract were reasonable and moderate. That contract is an executed contract. It has been part performed. It has been performed on the part of the Plaintiffs who were required in limine to withdraw their opposition to the Defendants' Bill, and who immediately withdrew that opposition upon the faith of its being performed;—who were then required, by the contract, to apply to Parliament for an Act authorising the sale and purchase of the Canal, and who accordingly obtained such Act, and discharged their moiety of the costs which the agreement bound them to discharge. It has been performed in part by the Defendants, who, pursuant to the draft agreement, promoted the success of the Plaintiffs' application for the Act, testified their consent to the passing of the Act under their common seal, and like the Plaintiffs discharged their moiety of the costs, as stipulated by the draft. The Act "authorises and requires" the Defendants, with the consent of three fifths of their proprietors present at a meeting specially held for the purpose, to purchase the Canal. And that, also is performed on the part of the company. The meeting is held. All the proprietors present pass a resolution authorising the directors to carry out the arrangement they had made with the Plaintiffs for the purchase of the Canal, and that resolution they communicate by their secretary to the Plaintiffs. This is all which the terms of the Act or the rules of this Court require to constitute a binding contract, and one of which this Court will enforce specific performance: *Edwards v. The Grand Junction Railway Company*(a), *Lord Petre v. The*

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(a) 1 My. & Cr. 650.

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In *Preston v. The Company of Proprietors of the Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway (c)*, and the other cases which will be cited contra, the object of the contract was *ultra vires* and unreasonable, the property to be purchased being remote from the intended line of railway,—not required or even to be used for the purposes of the intended railway, and the purchase was merely a colourable pretext for giving a douceur to parties who might otherwise have offered vexatious opposition. Here the Canal was in the immediate vicinity of the Defendants' line, and their traffic would necessarily be absorbed by the Act passing.

For these reasons, we submit that there should be a decree for specific performance. But if the Court objects to make such a decree at present, there will at least be a reference as to title, having regard to the terms of the draft agreement, by which we submit the company under the circumstances is bound.

Mr. *Rolt*, Q. C., and Mr. *Giffard*, for the Defendants, contended, that there being no document under the seal of the Railway Company, or signed by two of their directors as required by the 97th section of "The Companies Clauses Consolidation Act, 1845" (d), there was, in effect, no contract either before or after the passing of the Act enabling a sale and purchase of the Canal; nor was there anything in that Act to render valid any parol contract, if indeed there were any parol contract in existence before the Act was passed.

Then, as to part performance of any such parol contract,

(a) 1 Railw. Cas. 462.

(b) *Id.* 58.

(c) 5 H. L. C. 605.

(d) 8 & 9 Vict. c. 16.

the circumstance of the Plaintiffs' having withdrawn their opposition to the Defendants' Act did not amount to part performance, as was clear from the late decisions of the House of Lords in *Preston v. The Company of Proprietors of the Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway*(a); and in *The Caledonian and Dumbartonshire Railway Company v. The Magistrates of St. Helensburgh*(b); which it was impossible to read without coming to the conclusion that Lord Cottenham's decisions in *Edwards v. The Grand Junction Railway Company*, and the other cases cited contra, can no longer be treated as law.

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The VICE-CHANCELLOR.—It would occasion great rejoicing to many railway companies, to find they could be dishonest with impunity.

Mr. Giffard.—But no less dishonesty may result from a contrary doctrine. And so the Lord Chancellor puts it. He says, "It is manifest that the doctrine" (the doctrine that parol contracts entered into by agents before the passing of the Act can bind the company incorporated by the Act,) "is open to great objections; for, when a company is incorporated by Act of Parliament, hundreds, I may say thousands, of persons from all parts of the kingdom come and purchase shares upon the faith that the Act of Parliament tells them what their liabilities are."

For these reasons, we submit that the Court can neither decree specific performance, nor make any reference as to title. At all events, the reference sought by the Plaintiffs, limiting it to a possessory title as stipulated by the draft, cannot be granted, there being nothing to bind the Defendants to that draft, or to anything else restricting their right to a good title. That the mere circumstance of the solicitor's having approved the draft does not bind the directors, is too clear for argument.

(a) 5 H. L. C. 605.

(b) 2 Macq. 391.

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They cited, also, *The Queen v. The Mayor &c. of Stamford* (a).

Mr. *Daniel*, Q. C., in reply, contended, that, after the passing of the resolution of the Railway Company in July, 1852, the contract was, in fact, an executed contract. The subject matter of the contract was determined. The purchase money was determined. What more remained to be adjusted?

The VICE-CHANCELLOR.—A question of title would still remain. According to the original contract, the Plaintiffs were bound to make out a good title. After that, a draft passes between the solicitors. But how do you bind the directors to that draft?

Mr. *Daniel*, Q. C.—Their own solicitor shewed it to the directors as approved by him on their behalf. They must be presumed to have laid it before the special meeting which authorised them “to carry out the arrangement made by them with the Plaintiffs.”

Then the Act imposes a parliamentary obligation on the Defendants to complete the purchase. They are thereby “authorised *and required*” to purchase.

The VICE-CHANCELLOR.—But “upon such terms as shall be agreed upon between the companies.” You must shew an agreement between the companies. A resolution of shareholders would not, I apprehend, be an agreement within the 97th section of the Companies Clauses Consolidation Act.

Mr. *Daniel*, Q. C.—The words are, “Upon such terms as shall be, *or may have been*, agreed upon between the com-

panies." To meet that, the Plaintiffs are not bound to shew a contract actually under the corporate seal of the company, nor a contract signed by two directors. It is sufficient to shew a transaction so far executed as to prevent the company from saying that there is no agreement. To such a contract, the doubts which were thrown by the House of Lords upon the decisions of Lord *Cottenham* do not apply. This is a bonâ fide contract on both sides, entered into for the mutual benefit of both parties.

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The VICE-CHANCELLOR.—But so, also, was *Edwards v. The Grand Junction Railway Company* (a). I certainly had always thought, until those decisions of the House of Lords, that there was a broad distinction between cases of that description and a case like *Lord Petre's case* (b), for instance. Where persons who have been appointed agents to carry out certain negotiations for the benefit of a future company, carry out such negotiations bonâ fide, it does not seem very equitable to treat all they have done as a mere nullity and not binding on the company. However, doubts are clearly thrown by those decisions upon such cases as well as upon *Lord Petre's case*. Of course, it will now be impossible for any landowner to take any but one of these two courses—either to oppose a bill à l'outrance, or to get a clause confirming his agreement inserted in it, which I believe Parliament has never allowed. Whether that result is beneficial to companies may be doubtful.

Mr. *Daniel*, Q. C.—Nothing could be more injurious to companies than to have it supposed that the doctrine of part performance is less applicable to contracts entered into by them than to those between private persons. Here, there has been part performance, and the parties having now a parliamentary capacity to contract, the Court, seeing in this a bonâ fide agreement, one proper to be entered

(a) 1 My. & Cr. 650.

(b) 1 Railw. Cases, 462.

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into, and in part executed, will not allow the Defendants, after they have derived the full benefit of it, to abandon it, on the ground that it is not under seal, or signed by two of the directors.

The VICE-CHANCELLOR—This case will require some consideration. I need hardly say, that I am most anxious to afford relief, if possible, in such a case, where any two of the directors, if honestly disposed, might, at this moment, make a complete contract. If the Defendants succeed in escaping, there never was a more shocking case of dishonesty. However, it may be so.

Judgment reserved.

Aug. 3rd.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

Two questions arise in this case—the first with reference to the contract itself, the Defendants contending that it is not a contract which they are bound, under the circumstances, to perform; the second with reference to title—what title ought to be shewn to the property.

As regards the first question—whether there be any contract or agreement which the defendants are bound to perform, it stands thus: in February, 1846, there was a clear agreement entered into by the solicitors of the projectors of the then intended Railway Company with the solicitors of the Canal Company, by which the former, had they been acting on behalf of private persons and not on behalf of a company, would, as agents, have bound their principals to purchase the property of the Canal Company for 12,000*l.*, part of the agreement being, that the Canal Company was to “obtain the sanction of Parliament to the transfer of the canal to the Railway Company, and to its being discon-

tinued as a navigation if the Railway Company should desire to stop it up."

This agreement was entered into with a view of obviating the opposition which the Plaintiffs were about to make to the Defendants' bill, and which promised to be, to a great extent, effectual. And there is no question that this opposition was withdrawn by the Plaintiffs on the faith of the agreement so entered into, and that it was upon the faith of the agreement that they allowed the Act to pass.

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After the Railway Company had been so formed, several communications passed between the solicitors of the Defendants and the solicitors of the Plaintiffs. And a draft was forwarded on behalf of the Plaintiffs to the solicitors of the Defendants, in which, amongst other things, was a question—then for the first time suggested,—with reference to the title to the property. The draft contained a provision "that on the quiet and undisturbed possession for a period of forty years and upwards of the Canal Company being duly and satisfactorily shown and proved, such title thereto by possession should be accepted by the Railway Company without any objection." It appears from the correspondence that this draft was laid before the directors of the Railway Company. But it does not appear that it was laid by them before the Railway Company. It only appears, that, in February, 1847, a resolution was passed at a meeting of the proprietors of the Railway Company, authorising the directors of the Railway Company to complete the purchase for 12,000*l*. All this took place before the passing of the Act called "*The Leominster Canal Act, 1847,*" which authorised a sale and purchase of the canal.

Then the question is, what was the state of the contract between the two parties, previously to the passing of the *Leominster Canal Act, 1847*, which was obviously intended

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as an Act for giving effect to all the arrangements which had previously taken place.

As far as regards the provisional agreement entered into before the passing of the Defendants' Act for the purchase of the canal for 12,000*l.*, and the question whether that agreement can be held to have been binding on the company when formed, it appears to me that the case falls directly within the decision of the House of Lords in the case of *The Caledonian and Dumbartonshire Railway Company v. The Magistrates of St. Helensburgh* (a). That decision—as to the authority of which no one ought to entertain any doubt, proceeding, as it did, from the highest branch of judicature—went to this extent, and to this only, that, what directors cannot do after the incorporation of a company, provisional directors certainly cannot do before, for the purpose of binding the shareholders of the company: they cannot spend the money of their shareholders before their Act is passed, for purposes for which they would not be allowed to spend it after the passing of the Act. That decision applies directly to the case before me. Here there were no powers in the Defendants' Act enabling them to buy the Plaintiffs' canal. Therefore, it would have been *ultra vires* in the directors, after that Act was passed, to attempt to expend the money of their shareholders in purchasing the canal; and that being so, no agreement previously formed could have been binding upon the shareholders. It was not merely that the company was not incorporated, but there was a more serious impediment: such an expenditure would have been a misappropriation of the money of the shareholders. Even if the agreement had been signed by the directors of the Railway Company after the passing of their Act, it would not have been binding upon that company without the assistance of the succeeding Act of Parliament authorising the sale and purchase of the canal. And as regards the resolution of February, 1847,

(a) 2 Macqueen, 391.

that resolution could amount to no more than an expression of the consent of the individual proprietors who passed it to the purchase of the canal by the directors. It could not put the directors in a position to bind the company.

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If, indeed, the Plaintiffs had obtained from the directors a conditional agreement, stipulating, that, in the event of an Act being obtained authorising a sale and purchase of the canal, they would bind the company to carry out the agreement in question, then there can be no doubt, that, on the passing of the subsequent Act, the company might have been completely and effectually bound. But that ceremony, unfortunately, was not gone through. Reliance was placed on the good faith of the parties, and, as has so often occurred in similar cases, good faith has been found wanting. It will come to this, in the end, that no one will trust to anything but the signature of directors in dealing with public bodies. Experience proves that in such cases nothing short of an agreement drawn up and executed in the most legal, solemn, and binding form is worthy of reliance.

The Act, however, was passed, enabling the Plaintiffs to sell and the Defendants to purchase the canal; and up to this time perfect good faith was observed by both parties, neither party imagining for a moment that the other would renege from the agreement. The transaction was carried so far, that the stipulation in the draft, that the expenses attending the obtaining of the Act should be borne by both parties in equal moieties, was performed on the part of the Defendants; and the Act recites, that, so far as the Defendants were concerned, they gave their consent to the passing of the Act in the most formal manner under their seal.

I will now consider what was the effect of this Act in giving validity to any agreement that may be supposed to

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have then existed. The Act, amongst other recitals, contains the following:—

[The Vice-Chancellor read the recital printed above(a)].

Then it is enacted by the 4th section.—[His Honour read the 4th section of the Act (b)],

This section, certainly, is remarkably worded. The Act does not recite any previous agreement as having been come to between the companies, or as being binding upon them; and for the reasons I have already given, it does not appear that there was, at this time, any binding agreement. The Act does not even refer to the agreement in its imperfect and inchoate form. It binds the Railway Company to purchase if the Plaintiffs are willing to sell, but then the sale is to be subject to certain liabilities and incumbrances, “and generally upon such other terms and conditions in every particular, and with and subject to such provisions and stipulations as shall be, or may have been, agreed upon between the said companies.”

Upon the face of the Act, therefore, I cannot see anything recognising what had been done as a valid agreement. And as there was no agreement signed by the directors in the manner I have described, and stipulating that in the event of the Act being obtained they would bind the company, it does not appear to me that what had then been done amounted to a complete and binding agreement on the Railway Company. It was left to the parties after the Act passed to enter into such an agreement as they might be advised; and whatever should be finally concluded between the parties would, of course, be an agreement capable of being enforced.

(a) *Supra*, p. 657.

(b) *Vide supra*, p. 658.

The section then goes on to provide, that, whatever is to be done shall be done with the consent of three-fifths of the proprietors present at a special meeting. Certainly, this case is the strongest I ever met with of a company declining to perform honestly that which has been so strictly and honestly fulfilled up to a certain time in pursuance of one of those arrangements which are generally supposed to be binding on mankind. Here, every thing that has been done has been done in pursuance of the arrangement which is now repudiated. The directors of the Railway Company pay half the expense, as they had agreed to do by the imperfect agreement I have described. No one of their shareholders objects to that payment on the part of the directors. Further than that, the directors proceed to call a meeting for the purpose, as they express it in their advertisement,—following in the most literal manner the provisions of the Act,—of authorising the purchase by the company of the *Leominster* Canal. That meeting is held; a report of the directors as to what they had then done is read at the meeting; and a resolution is then passed, “That the directors of the company be, and they are hereby authorised by and with the consent of the proprietors present at this meeting,” (three-fifths were required, but it seems to have been unanimous,) “to purchase the *Leominster* Canal for 12,000*l.* at such time and upon such terms and conditions, and with and subject to such provisions and stipulations, as to them shall seem meet.”

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A question pressed upon my mind during the argument, whether, all this having been done, the meeting having been properly held, and the assent of the proprietors having been obtained, the company are not bound by these words in the Act: “the same company are hereby authorised *and required*”—whether the directors of the railway are not bound to carry out the powers vested in them by their own

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company, of making a purchase for the 12,000*l*. But there are two objections, either of which would prevent my adopting this view.

One objection is, that even if this Court were the proper tribunal to enforce a direction in an Act of Parliament, that a company shall make a purchase upon terms to be agreed upon, in the absence of an actual agreement, still, the Act providing that the purchase is to be made "upon such terms and conditions in every particular, and with and subject to such provisions and stipulations, as shall be agreed upon *between the said companies*," and the proprietors handing that over to the directors, and saying, "We stipulate as to the price,—but as to the other terms and conditions, provisions and stipulations (the title would be one of them) we leave those to you to settle,"—the result, after all, amounts but to this, that the matter is left to the directors to settle; and if so, I must take it to be that the directors are to settle it in the manner provided by the Companies Clauses Consolidation Act, namely, by an agreement signed by at least two of the directors.

But, independently of that, there is this further objection, that it is extremely questionable, to say the least, whether this Court be the proper tribunal to apply to under circumstances like the present. There were observations made by Lord Cottenham in *Adams v. The London & Blackwall Railway Company* (a), which lean very much to the conclusion, that, although we have long been in the habit of saying, when a notice is served by a company of their intention to take land, an agreement is thereby constituted, it is a matter of extreme doubt, to say the least, whether that is an agreement of which this Court will enforce specific performance. The bill in *Adams v. The London & Blackwall Railway Company* prayed specific perform-

(a) 6 Railw. Cases, 271.

ance of an agreement constituted by such a notice ; and Lord *Cottenham* considered, that there was some weight in the argument of counsel, that in such a case it is the more proper province of a mandamus to compel the company to proceed with the other steps which the Act directs, in the event of such a notice having been served ; and so here, if this can be taken to be an agreement by the company,—three-fifths of the proprietors present at a meeting having said that 12,000*l.* shall be the price, the question would arise, whether the proper mode of enforcing it would not be by mandamus, calling upon the company to purchase at that price. I apprehend, that, where there is not already an agreement under the company's seal, or signed by two of the directors in the form provided by the Companies Clauses Consolidation Act, or where there is any question left open as to the terms or conditions of the agreement, the proper mode of enforcing such a direction as is contained in this Act of Parliament is by mandamus, and not by a bill for specific performance.

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After this, unhappily nothing more is done. Again good faith is relied upon, and the solicitors trust to each other. Solicitors who act for railway companies must feel themselves in a painful position when their clients are disposed to depart from their agreement, although the solicitors on the other side may be in some degree to blame in not having taken the precaution, which experience has proved to be indispensable, of placing no reliance upon good faith and common honesty, but insisting in every case upon an agreement in strict form of law. That, however, is not done here. The solicitors carry on a correspondence as to the question of title and other matters, ending, at length, in the letter of 1854, in which the solicitors of the Railway Company say this:—

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[His Honour read the letter.]

Therefore, although everything seemed to be arranged and completed, the result is, that the directors decline to complete the purchase immediately, and wish to have time allowed them. Time is allowed, and it runs on till the filing of the bill, nothing more being done to bind the directors than what I have described. The resolution of the proprietors comes only to this, that they put it in the hands of the directors to complete the purchase; of course, they have a right to say it is to be completed in modo et formâ, as the Act directs, by two of the directors signing the agreement. The directors have the power, if they choose to exercise it; but if they do not choose to exercise it, I have no means of compelling them to do so, or of making the agreement binding on the company.

With regard to the question of title, I ought in justice to the directors of the Railway Company to say, that, looking at what has occurred as if it had been a question between private individuals, and not between public companies, I do not think that the directors have bound themselves to accept anything short of a good title. Nevertheless, the inability of the Canal Company to shew more than a possessory title is not the real cause of the directors object-
ing to complete the purchase, that cause being simply, as stated in the letter of 1854, that they have not the funds.

On the whole, therefore, I am obliged to dismiss the bill, although, of course, without costs.

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COMPANY.July 16th
& 17th.

BY an indenture, dated the 1st of February, 1856, under the seal of the Defendants, the company, and made between the company of the one part, and the Plaintiffs (thereinafter referred to as "the lessees") of the other part; the Defendants, the company, granted to the lessees and the survivor, &c., *first*, a certain license for publishing advertisements in the company's carriages; *secondly*, a license for publishing advertisements in frames upon the platform walls of the company's stations; and, *thirdly*, the sole and exclusive license and privilege during the term of ten years, from the 1st of January, 1856, of selling books, pamphlets, newspapers, and other publications at such of the several stations of the company as such lessees, or the survivor of them, his ex-

*Contracts—
Specific Per-
formance—
Agency—
Account—
Declaration
of Right.*

A railway company granted to two lessees the sole and exclusive license and privilege, for ten years, of selling books and other publications at such of the company's stations as

the lessees should think fit, and of using the book-stalls thereat respectively; covenanted that all books, &c., sent by the lessees to be sold pursuant to such license, should be conveyed by the company's trains to any such station without any charge; and warranted quiet and peaceable enjoyment.

Held—1st, as to stations where book-stalls were in existence at the date of the grant, that the company must be taken to have granted the user of those specific stalls; and if not, still it was incumbent on the company to shew that stalls to which they attempted to remove the lessees would be equally convenient. 2nd, as to other stations, that if the lessees could be entitled in any case to erect stalls thereat, this Court would not make a declaration to that effect, because this Court could not judge whether sales from stalls or by colportage should be adopted; and also because such a declaration would lead to continual applications with reference to the gradual increase in size of the stalls. 3rd, that the privilege of selling books, &c., authorised a bonâ fide sale to passengers, and such other persons as ordinarily attended at the company's stations on business connected with the railway, and not a general agency: consequently, that the lessees were not entitled to free carriage except in respect of books to be so sold.

And on bill filed by the lessees, an injunction was granted, restraining the company from evicting Plaintiffs from book-stalls existing at the date of the agreement, notwithstanding Plaintiffs failed in their contention as to the second and third points, and notwithstanding misconduct on the Plaintiffs' part in not strictly and honourably performing their part of the agreement, the Court being of opinion that it would be impossible, under the circumstances, to estimate the damages to which Plaintiffs would be exposed if an injunction were not granted.

This Court will not direct an account as to a part of an agreement where it cannot decree specific performance of the whole: nor will this Court make any declaration of right upon a contract except as to so much of it as has been, or is about to be, broken.

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cutors or administrators, or their or his assigns, should think fit for that purpose, and of using the book-stalls thereat respectively; the lessees, their executors, administrators, or assigns, yielding and paying to the company, their successors or assigns, every year during the first five years, the rent of 1500*l.*, and during the remainder of the said term the rent of 2000*l.*, by equal quarterly payments in advance. And the company covenanted with the lessees that all books, pamphlets, newspapers, publications, advertisements, announcements, handbills, and placards sent by the lessees to be sold, posted, affixed, or exhibited, or published pursuant to the licenses or privileges thereby granted, should be conveyed over all or any portions of the lines of railway and branches specified in the schedule thereunder written, by any of the public trains of the company for the time being, to any such station of the company without any charge whatsoever; the company not being in any way responsible for damage to, or accidental delay in the delivery of, the same; and the company did thereby, (subject to the payment in advance of the said annual rents thereby reserved, and the performance of the covenants and agreements therein contained), warrant unto the lessees the quiet and peaceable enjoyment and benefit, for the period, upon the terms and stipulations, and in manner aforesaid, according to the true intent and meaning of the now stating indenture.

It appeared, that, at and for some time previous to the date of the indenture, there was at the *Bishopsgate Street* station of the company's railway, and at a part of the departure platform, where the greater number of the down passengers were usually assembled, a room fitted up with book-shelves, and which was then already appropriated for the vending of books.

The Plaintiffs took possession of this room, and continued

to use it as a bookstall until shortly before the bill was filed, when the company insisted on removing them to another room situate at a less eligible part of the platform.

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The evidence shewed that there was great probability of very considerable depreciation in the Plaintiffs' business, in the event of their being removed as proposed by the Defendants.

It further appeared, that, under the license granted by the company to the Plaintiffs, of selling books at the stations, the Plaintiffs, for some time previously to the filing of the bill, had been in the habit of selling books, not merely to passengers and persons ordinarily attending at the stations on business, but to other persons, and had availed themselves of their privilege of having books conveyed by the company free of charge, for the purpose of supplying such other persons with parcels of books, inclosed in covers addressed to their agents at the country book-stalls.

This conduct on the part of the Plaintiffs was resisted by the Defendants, who caused the packages addressed to the Plaintiffs to be opened, and made certain charges for such parcels as they found inclosed, and addressed to other persons.

It also appeared, that the Defendants had prevented the Plaintiffs from erecting any book-stalls at stations where no book-stalls existed at the date of the agreement.

The Bill prayed that the Defendants might be decreed specifically to perform their agreement, and to allow the Plaintiffs to occupy as before the book-stall at the *Bishopsgate Street* station, and the other book-stalls at the other stations on the railway; that it might be declared, that, according to the true intent and meaning of the agreement,

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the Plaintiffs were at liberty to sell books, pamphlets, newspapers, or publications at the stations on the railway, whether there were book-stalls at such stations or not, and either to passengers or any other persons; and that the Defendants were bound to provide proper railway carriage for all such books, &c., or any parcels containing the same, to any of such stations free of charge, and for a decree accordingly; that an account might be taken of all sums of money improperly charged by the company in respect of carriage of any books, &c. belonging to the Plaintiffs, for sale at the said stations, contrary to the true intent and meaning of the agreement, and for repayment of such moneys; that the Defendants might be restrained from evicting the Plaintiffs from the book-stall at the *Bishopsgate Street* station, or any other book-stall along the railway; and from preventing the Plaintiffs from erecting book-stalls at any of the stations; and that they might also be restrained from removing advertisements affixed, exhibited, or published in frames, pursuant to the provisions of the agreement; and from opening parcels brought to the *Bishopsgate Street* station for the purpose of being delivered at any of the stations, and containing books, &c., belonging to the Plaintiffs.

Argument.

Mr. Cairns, Q. C., and Mr. Hetherington, for the Plaintiffs, now moved for a decree embodying the injunction prayed by the bill. They also asked for a declaration, that, according to the true construction of the agreement, the Plaintiffs were entitled to place stalls, at their own expense, at any station where no stall now exists, as they should see fit, provided such stalls were of a proper and reasonable size, and did not cause inconvenience to the company. Then, as to the free carriage of books, the Plaintiffs, having an agreement that they should have the exclusive privilege of selling books at such of the company's stations as they should

see fit, and that all books sent by the Plaintiffs to be sold pursuant to that privilege should be conveyed by the company to such stations free of charge, are entitled under that agreement to sell either to passengers or to any other persons, and the company are bound to convey, all such books or parcels containing them free of charge. There should, therefore, be a declaration to this effect, and an account as prayed by the bill.

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The VICE-CHANCELLOR said, that, with respect to the privilege of selling books, to which the Plaintiffs were entitled under their agreement, he must hold it to be a privilege for making a *bonâ fide* sale to passengers, and such other persons as ordinarily attended at the company's stations on business connected with the railway, and not a general agency.

Mr. Rolt, Q. C., and Mr. Goldemidt, for the Defendants, contended, that, according to the true construction of this agreement, the Plaintiffs were not entitled to the specific room at the *Bishopsgate* station, but only to such reasonable conveniences as are usually afforded for the sale of books by means of book-stalls upon railway platforms.

At any rate, the Plaintiffs' conduct in reference to the conveyance of the parcels had been such as to forfeit any right they might otherwise have had to the injunction prayed as to that book-stall, and which, in fact, would amount to a decree for specific performance of the agreement.

Mr. Cairns, Q. C., in reply.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In this case the prayer of the bill is for specific performance of an agreement between the company and the

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—

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Plaintiffs.—This, in one sense, was not asked in the opening; although, in another sense, such relief was asked as was only consistent with that mode of aiding the Plaintiffs. The bill, however, distinctly prays specific performance of the agreement, and that the Plaintiffs may be allowed to use the stalls in question as before; and then it prays for various declarations as to the true meaning of the agreement according to the Plaintiffs' interpretation of that instrument. What was asked in the opening was an injunction to restrain the Defendants from removing the advertisements; an injunction to restrain them from disturbing the Plaintiffs in their possession of the book-stalls comprised in the agreement; and also inquiries raising the question of the rights of the parties in reference to the establishment of other book-stalls where none existed at the date of the agreement, and in reference to the free conveyance by the railway of books, placards, and other publications; and, in reference to the latter, a declaration of right was asked as to the persons to whom and for whose use the Plaintiffs were entitled to have such publications conveyed free of charge.

In matters of this description, unless the agreement be one which ought to be specifically performed, it is not the course of this Court to interfere except to this extent, that it will not allow one party to break any formal legal engagement into which he may have entered, and then to say he will leave the other party to sue for damages with respect to that breach. Where the Court can prevent such a breach of an engagement by holding the parties specifically to abstain from breaking it, there the Court will interfere by injunction to restrain the breach of the positive engagement so entered into. But I apprehend, that in those cases it is not customary for the Court to make any declaration of the rights of the parties, except with reference to such parts of the agreement as are actually broken or intended to be broken by the parties.

In this case there are two branches of relief which the Plaintiffs may legitimately ask, although the bill may ask it somewhat more fully than the Plaintiffs are entitled to have it granted :—one with reference to the removal of the advertisements, as to which there has been no controversy since the bill was filed ; the other, which was really the important part of the relief prayed, with reference to the book-stalls.

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With respect to the latter, the facts are these :—Before and at the time of the agreement being entered into, there existed at the *Bishopsgate Street* station what may be called the Metropolitan book-stall, situate at a part of the platform where the greater number of passengers would be assembled, and which, therefore, would naturally form a leading feature in the agreement. This was not a moveable stall, or a stall fixed with screws, and which might, therefore, be transferred from one part of the platform to another, but an actual room, which might be called a stall, or a shop, or by any other name, and which was appropriated to the vending of books at that station at the date of the agreement. That circumstance must be taken to have formed on both sides a leading consideration in the agreement into which the parties entered. They had also in contemplation other book-stalls, which, however, whether moveable or not, were certainly of much less consequence than the room I have mentioned. And in that state of circumstances, the agreement was entered into.

The agreement was not an agreement to let the stalls, but was merely a license of user during the period for which the agreement was entered into. The words are these :—“Thirdly, that the lessees should have the sole and exclusive privilege, from time to time, and at all times, during the said term of ten years from the 1st of January, 1856, of selling books, pamphlets, newspapers, and other

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publications at such of the said several stations of the company as such lessees, &c. should think fit for that purpose, and of using the book-stalls thereat respectively."

Now I apprehend, that, according to the strict and rigorous construction of that clause,—although there is considerable possibility of its operating, under certain circumstances, to the Plaintiffs' disadvantage—the Plaintiffs have a right to say, when they find a particular shop in existence at the date of the agreement at one of the stations there referred to, that they are to have the user of that specific shop for the whole of the period of ten years; the agreement was in effect for the user of that specific shop or stall, and they are not to be dispossessed of it.

It was argued on the other side, that, if that be so, unless the Plaintiffs can compel the Defendants to adhere to their existing temporary arrangements as to passenger traffic with reference to the position of the platforms and the like, the very substance of the agreement, as regards their own benefit, may be departed from; because, unless they can insist on following the Defendants, should they find it necessary to transfer their down traffic to the opposite platform, so as to subject every down passenger to the necessity of crossing over in order to reach the Plaintiffs' stall, the construction the Plaintiffs are contending for is one that would deprive them of the very benefit they seek to establish. But the answer to that argument is, that both parties relied on the arrangements existing at the date of the agreement. They had existed for many years; there was no probability of their being altered; and neither party contemplated that any re-arrangement of the company's traffic would take place, which would make the occupation of the room in question less beneficial than it was at the date of the agreement.

How far, under the other circumstances of this case, and

having regard to the conduct of the Plaintiffs, the Court might be disposed to grant them the relief prayed in reference to this book-stall, if there were not ground for concluding that serious inconvenience would result from such relief being withheld, might be extremely questionable; because, a party coming here to assert his strict rights under an agreement is expected to stand on the strict observance, on his own part, of that agreement; and, again, if these Plaintiffs were attempting to assert strict rights of an inappreciable value, the Court, under the circumstances of this case, would leave them to their remedy at law. But, though I am not inclined in any way to stretch the point in favour of the Plaintiffs, in my opinion this is not at all a frivolous contention on their part. With regard to the book stall at the *Bishopsgate Street* station, it is manifest,—and it is conceded in the affidavits on the part of the Defendants,—that there is a great probability of a very considerable depreciation of the Plaintiffs' business in the event of its being removed as proposed by the Defendants. It appears,—and it is admitted by their affidavit,—that, although occasionally the railing which separates passengers by the train which is on the point of departure from those who are going by the train immediately succeeding, is placed so as to keep the latter from the Plaintiffs' stall, yet in the majority of instances that railing is placed at a higher point, so as to leave the general gathering of the passengers in the immediate vicinity of the stall; whereas the consequence of the proposed removal would be, that the Plaintiffs would only have for customers those passengers who are on the eve of departure by the train which is on the point of starting, and none of those who are waiting until that train has departed, and who have therefore leisure to resort to places like this where books are disposed of. I cannot entertain a doubt that serious inconvenience and injury would be inflicted on the Plaintiffs by the proposed

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removal. And I have further to consider that they are paying a very high rent, 1500*l.* a year, for the privilege of which that removal would to that extent deprive them.

Even if I adopted the lower construction for which the Defendants contended, viz. that the Plaintiffs were to have such reasonable conveniences as are usually afforded for the sale of books by means of book-stalls upon railway platforms, I conceive that it would be incumbent on the Defendants, before they could displace the Plaintiffs, to shew that the locality to which they propose to remove them is equally convenient with that which they at present occupy. But I adopt the higher construction, and hold, that, according to the true interpretation of this agreement, it means the room or stall actually existing at the date of the agreement.

Upon two branches, therefore, of this bill, the Plaintiffs as it seems to me, are entitled to relief. They are entitled to an injunction to restrain the Defendants from removing the advertisements from the walls of the several stations, and to an injunction restraining them from removing the Plaintiffs from the book-stall at the *Bishopsgate Street* station, or any other book-stall existing at the date of the agreement at any station comprised in the agreement; and that will include the stall at the *Bishop's Stortford* station, which I should not have thought of paramount importance; and its removal does not involve any inconvenience of a serious nature, or which could not be remedied without suit.

But the remainder of the case is of a different nature. In the first place, the Plaintiffs seek to have it declared, that, according to the true construction of the agreement, they are entitled to place stalls, at their own expense, at any station where no stall now exists, as they shall think fit, provided such stalls are of a proper and reasonable size,

and do not cause inconvenience to the company. Now, it seems to me, that, if the Plaintiffs intended to reserve to themselves a right of that description, there is nothing in the agreement to enable the Court to make such a declaration, or to frame any order which could properly be applicable to an agreement of this description. The Plaintiffs have only reserved to themselves and their assigns the license and privilege of selling the publications at such of the company's stations as they should think fit for that purpose; and although such a reservation is to be so construed as to enable the Plaintiffs to derive the full reasonable benefit of such license and privilege, what precise construction is to be put upon it, is a question which I must leave the parties to determine at law. This Court cannot determine what is the reasonable benefit to be so derived by the Plaintiffs. At stations where no book-stalls exist, the probability is, as was suggested in argument, that no one has thought it desirable to have any. At such stations the system of col-portage, doubtless, exists, if books are sold at all; and it is impossible for this Court to determine whether that system should be continued, or whether the Plaintiffs should have a stall or shelf six feet or four feet square. Besides, if I were to hold that they were entitled to have such a stall or shelf, it would not terminate there, but there would be continual applications to the Court with reference to the gradual increase in size of such stalls and shelves, with which it would be impossible for this Court to deal. Entertaining a strong opinion in my own mind that the Plaintiffs cannot insist upon a right of this kind beyond the mere reasonable facility for selling such publications and in such quantities as may be deemed requisite, I think the construction of the agreement must be left to the good faith of the parties themselves; and if they cannot agree, they must seek their remedy at law.

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In the next question raised by the Plaintiffs, which is

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one of serious importance to the Company, the Plaintiffs have entirely failed. They contend, that, having an agreement that they shall have the exclusive privilege of selling books at such of the company's stations as they shall think fit, and that all books sent by the Plaintiffs to be sold pursuant to that privilege shall be conveyed by the company to such stations free of charge, they are entitled, under that agreement, to sell either to passengers or any other persons, and the company are bound to convey all such books or parcels containing the same free of charge; and they therefore ask for a declaration to this effect, and an account of all sums of money improperly charged by the company in respect of the carriage of any books belonging to the Plaintiffs for sale at the stations contrary to the true intent and meaning of the agreement.

Now, with respect to the privilege of selling books to which the Plaintiffs are entitled under this agreement, I have already held it to be a privilege for making a *bonâ fide* sale to passengers and such other persons as ordinarily attend at the company's stations on business connected with the railway, and not a general agency enabling the Plaintiffs to sell to any persons who might come up from the town or neighbourhood,—not for the purpose of travelling nor even for the purpose of seeing any one who was travelling—and say, “We know you can get your books conveyed by the company free of charge; we will come here and order books from you with which we can supply the town; and we will arrange to remunerate you, and you shall make the company bring down all the books we order free of charge.” It is perfectly clear that any such stipulation was entirely foreign to the agreement entered into. As to such an agency being carried out by orders being given at the stalls, it is plain that such orders would soon be found to be a useless formality, and would be dispensed with; and the course of dealing would be, that large orders would be given

by every bookseller in the town as soon as it was found that parcels could be conveyed, so as to save half the carriage, addressed to persons for whom the company unquestionably intended no benefit under this agreement. Upon that part of the case, therefore, as well as upon that in which the Plaintiffs seek a declaration that they are entitled to establish book-stalls where none exist, it seems to me that there has been a complete failure.

1857.
HOLMES
v.
THE EASTERN
COUNTIES
RAILWAY Co.
Judgment.

Then, as regards the account which is sought, I apprehend, that to grant such an account would be a semi-performance of the agreement, and such a course of proceeding as was never heard of. It never could be expected of this Court, that, where it cannot perform an agreement in toto, it should direct an account with reference to a particular portion of it. How far such an account could be shewn to be the right of the Plaintiffs, (wholly independently of the observation that it could not be ordered without a decree for specific performance of the whole agreement,) is a point upon which I will not express any opinion beyond saying that this part of the Plaintiffs' case seems to me an entire failure.

The result would probably be, if in this case I could follow the ordinary course of suits of this description, that, except as to the injunctions to which I have already held the Plaintiffs to be entitled, the bill would be dismissed. As to the injunctions, the Plaintiffs would be entitled to a decree with costs, because there was a great controversy with regard to the book-stall in *London*; and then, as to the rest, it would be dismissed with or without costs.

But here, upon the other part of the case, the conduct of the Plaintiffs has been such as to cause me considerable difficulty in giving them any relief at all in this suit:

1857.

HOLMES

v.

THE EASTERN
COUNTIES
RAILWAY CO.*Judgment.*

because parties coming here for specific performance of a contract, are bound to shew bonâ fide compliance, on their own part, with its provisions; and in this case the course of conduct taken by the Plaintiffs in reference to the conveyance of parcels to other persons, has been such as to cause great doubt and hesitation in my mind as to the propriety of relieving them at all. I am by no means satisfied of the bona fides of the Plaintiffs with reference to the parcels so conveyed. It seems to me, that, if the Plaintiffs intended to assert that as their right, which I have determined not to be their right, with reference to the conveyance of these parcels, they ought to have done so openly. [His Honour then proceeded to shew from the evidence that this had not been done, and proceeded—]

On the other hand, the Plaintiffs have, with reference to the question of the book-stalls, an important right, as to which, having regard to the heavy rent they are paying, and the difficulty from the nature of the case in estimating damages, they would be left without a remedy, if this Court did not give them relief by way of specific performance. And the question is, whether, by their conduct in reference to these parcels, they have so far forfeited that right, that they are to be left without remedy in respect of the loss they would sustain in the event of their being removed from the *Bishopsgate Street* stall. If I thought that any conduct of this kind on the Plaintiffs' part could be repeated without the company having it in their power to discover it—if I thought it was a matter in which I should have found it necessary to call for an undertaking from the Plaintiffs, I should consider that it would not be reasonable to leave the company to rely on that undertaking alone. But it appears to me that the company have the remedy in their own hands. The company are not bound to carry any parcels but to the stalls, and they have clearly a right not only to

stand by and see such parcels delivered, but to insist upon being by when they are opened. And I apprehend, that they will use those rights in order to secure themselves against any attempt at fraud of this description.

1857.
 HOLMES
 v.
 THE EASTERN
 COUNTIES
 RAILWAY CO.
 Judgment.

Under these circumstances, I do not feel myself at liberty to withhold from the Plaintiffs this relief, without which they would be left utterly remediless. But when I come to the question of costs, if entitled to a decree with costs as to the injunctions I have granted, as to the rest of their case their conduct has been such that they would have their bill dismissed with costs. Therefore, it seems to me better to give them relief as to the injunctions, and to dismiss the rest of the bill, and to say nothing about costs on either side.

DECREE for injunction restraining Defendants from evicting Plaintiffs from the book-stall at the *Bishopsgate Street* station or any other book-stall existing at the date of the agreement at any station comprised in the agreement. Also an injunction to restrain Defendants from removing any advertisement, &c. affixed, exhibited, or published pursuant to the provisions of the agreement.—Dismiss the rest of the bill.—No costs.

*Minute of
 Decree.*

IN RE CLULOW'S ESTATES.

*April 18th
 & 28th.*

THE testator, by his will, in 1821, devised certain parts of his freehold lands to trustees, in trust for his son

*Rents—Appor-
 tionment—4 &
 5 Will. 4, c. 22.*

Devise in trust for one for life, remainder for his first and other sons in tail, remainder for testator's own right heirs. The devisee for life proved to be heir-at-law of the testator, and died intestate, and without having had any issue:—*Held*, that, notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a "determination of his interest" within the meaning of the Act 4 & 5 Will. 4, c. 22; and therefore, following *Browne v. Amyot*, (3 Hare, 173) the rents were not apportionable between his heir and his personal representative.

Where it can be predicated that the interest mentioned in the 2nd section of the Act has been determined, the rents and other payments there mentioned shall be apportioned. But where this cannot be predicated, the contest being between the heir and the executor, the heir shall take the whole, and there shall be no apportionment.

1857.
In re
CLULOW'S
ESTATES.

Statement.

William Clulow for life, with remainder to his first and other sons successively in tail, with remainder to his (the testator's) own right heirs.

The testator died in 1822, leaving *William Clulow* his eldest son and heir at law.

William Clulow died on the 1st of September, 1855, without having had any issue, and intestate as to his real estates.

A question having arisen on the death of *William Clulow*, whether the rents growing due at the time of his death, and payable on the rent-day next after his decease, were apportionable between his coheirs at law and his executors; a sum of 279*l.* 7*s.* 7*d.*, being the apportioned amount of such rents up to the 1st of September, 1855, was paid into Court by the trustees of the will.

The coheirs at law now presented a petition, praying that it might be declared that the rents in question were not apportionable, and for payment of the fund in court to the petitioners.

Argument.

Mr. *Daniel*, Q. C., and Mr. *G. L. Russell*, for the petitioners, contended, that the interest of *William Clulow* not having determined upon his decease, the rents were not apportionable, and the petitioners were entitled to the fund in court.

The case depended upon the construction to be put upon the 2nd section of the Act 4 & 5 Will. 4, c. 22. And *Browne v. Amyot* (a) had established, that, according to the true construction of that Act, the "death" referred to in

(a) 3 Hare, 173.

the 2nd section must be such a death as produces a "termination of the interest" of the deceased in the property in question.

1857.
In re
CLULOW'S
ESTATES.
Argument.

Mr. Willcock, Q. C., and Mr. Lewin for the executors of *William Clulow*, did not dispute the authority of *Browne v. Amyot*, but distinguished that case from the present. Here the deceased was not seised in fee as in *Browne v. Amyot*. The estates being equitable were to be enjoyed as limited; and an estate might have arisen between the life estate of *William Clulow* and his remainder in fee, which would have prevented the remainder in fee from vesting absolutely. Strictly speaking, the interest of the deceased had determined by means of his death, and the Act, which was remedial and to be construed literally, applied. The executors, therefore, were entitled to have the rents apportioned, and to payment of the fund in court.

They cited *Lock v. De Burgh (a)*, *Knight v. Boughton (b)*, *Fletcher v. Moore (c)*, and *Kevill v. Davis (d)*, also Co. Litt. 319. b., and *Doe v. Fonnereau (e)*.

Mr. Daniel, Q. C., replied.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD :

April 28th.
Judgment.

It appears to me, looking to the case of *Browne v. Amyot (f)*, that the principle which was there established by Vice-Chancellor *Wigram* is the principle by which my decision in this case must be governed.

(a) 4 DeG. & Sm. 470.

(d) 11 Jur. 31.

(b) 12 Beav. 312.

(e) 2 Doug. 506, note.

(c) V. C. Kindersley, not reported.

(f) 3 Hare, 173.

1857.

In re
CLULOW'S
ESTATES.
 —
Judgment.

What the Vice-Chancellor there says is this:—The preamble of the Act recites, "Whereas by law rents, annuities, and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands." That part of the preamble indicates one class of cases with which the Legislature proposed to deal; but the Vice-Chancellor said, he could not rely on that alone, because the preamble goes further, adding this: "and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy;" leaving it doubtful whether those other evils apply to cases of a similar, or to cases of a different class. He therefore concluded, that, the preamble being general, the expressions of the enacting clause must determine the case.

Now, by the enacting clause(a) it is provided, that, "from and after the passing of the Act, all rents service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this Act), and all rentscharge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of *Great Britain and Ireland*, made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act, shall be apportioned, so and in such manner, that *on the death of any person interested in any*

(a) Sect. 2.

such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, *or on the determination, by any other means* whatsoever, of the interest of any such person, he or she, and his or her executors, administrators, or assigns shall be entitled to a proportion of such rents" and other payments. And upon that clause, Vice-Chancellor *Wigram* held, that it was clear to him that by the terms "on the death of any person interested in such rents," the Legislature must have intended a death occasioning the determination of the interest of such person, that being the necessary effect of the words in the immediate context specifying the alternative event upon which there is to be an apportionment: "or on the determination, by any other means whatsoever, of the interest of any such person:"—in other words, that, in order to bring the case within the operation of the Act by reason of the death of the person interested in the rents in question, you must shew, not merely death, but that the interest of such person was determined by his death.

1857.
In re
CHULOW'S
ESTATES.
Judgment.

In the case before me, the question arises in this way: The property was devised upon trust for *William Chulow*, the last holder, for life, with remainder to his first and other sons in tail, with remainder, in the events which happened (he being heir at law of the testator), to himself in fee. He had no issue; and at the moment therefore of his death, the limitation over took effect, and the petitioners came in as his coheirs at law, succeeding ab intestato, and as representing their ancestor. And it is in that state of circumstances that this contest arises between them and the executors of the deceased. That being so, the case is in effect reduced to a contest between the executor and the heir, and that is the governing test in all these cases.

1857.

In re
CLULOW'S
ESTATE.

—
Judgment.

It was ingeniously argued by Mr. *Willcock*, that, there being an estate tail interposed between the life estate of the deceased and his remainder in fee, that estate tail might have arisen, and, had it done so, it would have prevented the remainder in fee from vesting absolutely. But the answer is, that a case of this kind must always be tried by the events which have happened; and here no such estate arose, consequently the remainder in fee vested absolutely; and that being so, how can the executor, *quā* executor, avail himself of the Act to raise a contest of this description with the heir, who comes in as representing his ancestor?

The real intent of the statute is clearly as it was stated to be in *Browne v. Amyot*, that, where it can be predicated that the interest of any person as there described has been determined, there the rents and other payments mentioned in the Act shall be apportioned. But where this cannot be predicated, there, the contest being between the heir and the executor of such person, the heir shall take the whole, and there shall be no apportionment.

In truth, in this there is no inconsistency as has been supposed. The Court does not, as it has been argued, put two inconsistent constructions upon the Act. But it is simply this, that the Act says one rule shall prevail as between the executor and the remainderman where the interest is determined, and another as between the executor and the heir where it is not.

I must therefore hold that the claim of the executor in this case to have the rents apportioned cannot be sustained; and I follow *Browne v. Amyot* in so holding.

Minute of
Order.

DECLARE that the Petitioners are entitled to the fund in court; and order payment accordingly.

1857.

DUGDALE v. ROBERTSON.

July 15th.

By an indenture of demise, dated 1842, and made between the then owners in fee of the demised property, whose interest was now vested in the Plaintiffs, of the one part, and the Defendants of the other part, the parties of the first part granted and demised to the Defendants (inter alia) all and every the mines, veins, pits, beds, and seams of iron, ironstone, coals, metals, minerals, and the ores thereof, and also all other minerals, metals, and earths whatsoever, which then were or thereafter during the continuance of that demise might be found out, opened, or discovered, by any ways or means whatsoever, in, upon, or underneath 514 acres of land delineated in the plan thereto attached; And also full and free liberty, license, and authority for the Defendants, and their agents, miners, workmen, colliers, servants, labourers, and others to dig, open, search for, work, gain, raise and get up, stack and carry along, use, sell, and dispose of all sorts of iron, ironstone, coal, or the ores thereof respectively, and also all other metals, minerals, and earths, in, from, over, upon, or under the said farms, lands, and premises, and every or any part thereof; and to open, dig, sink, drive, win, work, and make any pits, shafts, levels, cuts, canals, soughs, tunnels, trenches, drains, watercourses, weirs, railroads, tramroads, wheelroads, deposits of rubbish and spoil banks, into, upon, about, or under the said mines and works, lands and hereditaments, *except in or upon any demesne lands and pleasure grounds belonging to and occupied with the mansion called Brymbo Hall, and coloured red* upon the said plan. Provided that all pits or works sunk or raised for the purpose of working the minerals under the grounds coloured yellow in the plan, should be sunk and raised at

Mines and Minerals—Leases—Surface—Right to support of—Injunction.

There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise.

Inquiry directed upon this principle, with a view to an injunction.

1857.
 DUGDALE
 v.
 ROBERTSON.
 —
Statement.

the furthest point from the mansion house, at the part coloured yellow : to hold the premises to the Defendants for a term of sixty years, at the yearly rents and royalties therein mentioned. And the indenture contained covenants by the Defendants not to do any act whereby the said lands and grounds should be unnecessarily injured; and not to commit any manner of waste, damage, or injury other than such as should be reasonably necessary or unavoidable, in or upon any of the said lands thereinbefore described, under or by virtue of the powers thereinbefore contained. The indenture also contained a covenant by the Defendants at all times during the continuance of the said term, to allow to the parties of the first part, their heirs or assigns, "or other the occupier or occupiers for the time being of *Brymbo Hall* aforesaid," such coal as they should reasonably require, at certain specified rates of payment.

The demesne lands and pleasure grounds attached to the mansion house, and coloured red in the plan, comprised about four acres. The lands coloured yellow in the plan consisted of ornamental grounds surrounding the lands coloured red.

By virtue of this demise the Defendants assumed a right to excavate under the lands coloured red as well as under those coloured yellow, and proceeded with such excavation until the mansion and offices began to give way.

The Plaintiffs thereupon filed their bill for an injunction to restrain the Defendants from excavating under the lands coloured red, or under any portion of the lands coloured yellow, supporting or assisting in the support of the lands coloured red; and for an order upon the Defendants to fill up all the excavations already made by them under the lands coloured red.

The cause now came on to be heard upon motion for a decree.

1857.
DUGDALE
v.
ROBERTSON.
Argument.

Mr. Rolt, Q. C., Mr. James, Q. C., and Mr. Little, for the Plaintiffs, contended, *first*, that the mines and minerals under the lands coloured red did not pass by the lease; *Secondly*, that, if they did pass by the lease, they were not authorised to be excavated or gotten; and *thirdly*, that, in any event, the Defendants were not entitled to excavate or to work any mines or minerals under any lands mentioned in the lease, so as to injure any part of the mansion and offices.

The law was clear, that, of common right, and independently of any evidence to shew how the surface and the minerals have come into different hands, the owner of the surface is entitled to support from the subjacent strata; and if the owner of the minerals remove them, it is his duty to leave sufficient support for the surface in its natural state: *Humphries v. Brogden* (a); and this common law right is not affected by the special contract, but the Plaintiffs are entitled to the benefit of both: *Caledonian Railway Company v. Sprot* (b); where land had been granted to a railway company, reserving the minerals to the grantor, and it was held that the latter was not entitled to work even under his own adjoining lands in any manner calculated to endanger the railway. See also the *Caledonian Railway Company v. Lord Belhaven* (c), where the same rule was followed.

The VICE-CHANCELLOR held, upon the first point, that the mines and minerals under the land coloured red were included in and passed by the lease.

Mr. Willcock, Q. C., Mr. Cairns, Q. C., Mr. Kenyon, and Mr. Eddis, for the Defendants, contended, that, if the first

(a) 12 Q. B. 739.

(b) 2 Macq. 449.

(c) 3 Jur. N. S. 573.

1857.
 DUGDALE
 v.
 ROBERTSON.
 —
Argument.

point was decided in their favour, the second must be so. If the mines and minerals under the land coloured red were included in and passed by the lease, it could not reasonably be contended that the Defendants were not authorised to excavate and get them. Another construction must be put upon the words "except in or upon any demesne lands, &c., coloured red," which, in fact, were intended merely to prevent the opening of pits, and the digging and sinking of shafts and levels in or upon any such demesne lands, and not to prevent excavating below them.

Then, as to the right to support from the subjacent strata, it was clear, that, whatever may be the common law rights, in the absence of special contract, it is open to parties, by special contract, to qualify and even to waive their *primâ facie* right to support, and to deprive themselves of their right to damages or to protection in respect of injury, however great, occasioned by the working of the minerals below the surface: *Rowbotham v. Wilson*(a).

The present case was distinguishable from *Harris v. Ryding*(b) as well as from *Smart v. Morton*(c). Here the mines were granted, the surface was reserved. There, conversely, the surface was granted, and the mines were reserved. In those cases, therefore, it might well be held that the grantee of the surface had a *primâ facie* right to support, from which nothing in the grant could authorise the Defendant in so working his mines as in any way to derogate.

The VICE-CHANCELLOR intimated to Mr. *Rolt*, that he was prepared, without hearing a reply, to make the decree set out below; but if he required more, he must hear him.

(a) 25 LAW J. (Q.B.) 362.

(b) 5 M. & W. 60.

(c) 5 Ell. & Bl. 30.

Mr. *Rolt*, Q. C., would be satisfied with the decree proposed.

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 DUGDALE
 v.
 ROBERTSON.
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case resolves itself into the construction to be put upon the indenture; and upon the terms of the indenture it is clear that the mines and minerals under the lands coloured red were included in and did pass by the lease; but that the Defendants were not authorised by that indenture to work them, or to execute any works upon those lands, or to search for any coal or mineral therein. [His Honor shewed this from the words of the indenture and from the evidence as to the conduct of the parties; and proceeded—]

As to the rest of the lands comprised in the indenture, the common law right is now clear from the decision of the Court of Queen's Bench in *Smart v. Morton* (a)—although that did not carry the law further than the decision of the Court of Exchequer in *Harris v. Ryding* (b). In *Smart v. Morton*, there was a plea, that, in the deed by which the surface was granted to the parties through whom the Plaintiff claimed, there was an express reservation of the mines, with liberty to work those mines and drive drifts, and use any other ways for the better and more commodious working and winning the same; and the grantor covenanted to pay treble damages for such loss or damage as should be sustained by the grantee; that it was in the necessary and needful working of the mines that the Defendant had caused the damages complained of, and that he was ready to pay damages according to the covenant. But, on demurrer, the Court held, that the plea was bad; for the occupier of the surface had a *prima facie* right to the sup-

(a) 5 ELL. & BL. 30.

(b) 5 M. & W. 60.

1857.
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 v.
 ROBERTSON.
 Judgment.

port of the subjacent strata, and the deed did not authorise any working in derogation of that right.

And so, conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, that the lessor is demising them in such a manner as is consistent with the retention, by himself, of his own right to support, as in the case put in the judgment of the House of Lords^(a) of a demise of the upper part of a house. If I demise to you the lower story of a house, and reserve to myself an upper story, the presumption is that I do not part with my right to be supported by the story I demise.

It is true, there may be an express stipulation, as there was in *Rowbotham v. Wilson*^(b), by which the owner of the surface waives his right to support, and agrees to allow the mines to be so worked as to destroy his property; but in the absence of express words, shewing distinctly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma* as it was before, and with that natural support which it possessed before he parted with the subjacent strata; and so it would be in the case of a watercourse or other easement of a like nature.

If any evidence were required in aid of this presumption, no deed ever contained clearer indication than the present, that the property was intended to be occupied and enjoyed as before the lease; for here there is an express covenant on the part of the Defendants to supply the Plaintiffs "or other the occupier or occupiers for the time being of *Brymbo Hall*," the mansion in question, with coal. But no such evidence is required.

(a) 2 Macq. 449.

(b) 25 Law J. (Q. B.) 362.

DECLARE, that the Defendants are not entitled, under the lease, to work any coal or mineral, or execute any works upon the portion of land marked red upon the plan attached to the lease, or to search for any coal or mineral therein; and order an injunction accordingly.

DECLARE that the Plaintiffs are entitled to have a sufficient support for upholding the mansion-house called *Brymbo Hall*, and the offices and buildings upon the said portion of land coloured red; and that the Defendants are not entitled to remove any of the earth or soil necessary for such support from any part of the demised premises.

INQUIRE whether any and what part of the lands comprised in the indenture of demise, other than the portion of land coloured red, affords such support to the said mansion-house, offices, and buildings, as to render it necessary that the same or any or what part thereof should be left undisturbed for the purpose of such support.

Liberty for Plaintiffs to bring any such action as they may be advised in respect of any past working of the mines.

Defendants to permit Plaintiffs, at all reasonable times, to have access to the mines, for the purpose of making such supports as may be necessary for upholding the mansion.

1857.
DUGDALE
v.
ROBERTSON.
Minute of
Decree.

HICKS v. HASTINGS.

ELIZABETH BARKER, by her will, in 1807, appointed the manor of *Watton* (which in 1796 had been limited to the use of *Mason* and *Grigson* and their heirs, upon trust, as she should by will appoint,) to uses under which, in 1828, the Plaintiff, then an infant, became entitled as tenant in tail in possession; and she devised her residuary real estate to *Harvey*, *Hebgin*, and *Mason*, and their heirs, upon trust to sell.

tail in possession, and devised her residuary real estate to trustees upon trust to sell. The trustees sold (inter alia) a field, part of which was shown by the abstract to be parcel of the manor, and procured the legal estate in the whole to be conveyed to the purchaser. *Held*, that, notwithstanding the fault of the confusion lay with the party through whom the Plaintiff claimed, the Plaintiff was not precluded from establishing in this Court a claim to his portion of the land, and to a proportional part of the rents from the time when he came of age. And an inquiry was directed, in what part of the field the Plaintiff's portion was situate.

June 1st &
2nd; July
10th & 13th.

*Boundaries—
Confusion of.*

Testatrix by her will appointed the manor of *W.* (over which she had an equitable power of appointment) to uses, under which the Plaintiff became entitled as tenant in

1857.
 ———
 HICKS
 v.
 HASTINGS.
 ———
 Statement.

In 1814, *Harvey, Hebgin, and Mason*, proceeded to sell the residuary real estate of the testatrix, together with other lands not comprised in the residuary devise, in lots, Lot 11 being described in the particulars of sale as containing 6 a. 1 r. 24 p., "whereof 2 a. 3 r. are freehold, and the residue leasehold, for the term of 900 years, commencing 20th March, 1567, at a peppercorn rent." *Smith Hastings* became the purchaser of Lot 11, and took a conveyance accordingly, *Grigson and Mason* joining in such conveyance so as to pass their legal estate, if any, in the premises.

Smith Hastings afterwards sold and conveyed a portion of the property to the Defendant *Secker*, and by his will devised the remainder to his children the infant Defendants, and appointed his wife, the Defendant *Sarah Hastings*, his executrix. He died in 1849.

The Plaintiff attained the age of twenty-one in the same year; after which he executed a disentailing deed, vesting the manor in himself in fee.

The bill averred, that the 2 a. 3 r., described in the particulars of sale as freehold, were, in fact, parcel of the manor, and did not pass under the residuary devise; and that this circumstance appeared by the abstract delivered to *Hastings* before he completed his purchase; and prayed that an account might be taken of the rents of the 2 a. 3 r. received by him and by the Defendants *Sarah Hastings* and *Secker* since the 1st of June, 1831, when the Plaintiff became entitled to the manor as tenant in tail in possession; that the Defendants might be decreed to convey the 2 a. 3 r. to the Plaintiff; and that a commission might issue, or directions be given for ascertaining and settling the boundaries of the 2 a. 3 r., or, if such boundaries could not be ascertained, that a quantity of land of equal value might be set out of the inclosure forming Lot 11.

Evidence was adduced on the part of the Plaintiffs to shew that the 2 a. 3 r. was originally copyhold, but in 1793 became extinguished in and formed parcel of the manor.

1857.
HICKS
v.
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Argument.

Mr. Rolt, Q. C., and Mr. Rowcliffe, for the Plaintiff, contended that the evidence shewed that the 2 a. 3 r. was parcel of the manor as early as 1793; and that *Smith Hastings* had taken a conveyance with notice of that circumstance. That being so, there must be a decree as in *Hicks v. Sallitt* (a),—a suit instituted by the same Plaintiff in reference to the same devise, and which ought to have set at rest all questions arising under it—for an account and reconveyance; or, if the boundaries cannot be ascertained, the Plaintiff should have an equivalent: *The Duke of Leeds v. The Earl of Strafford* (b), *The Attorney General v. Fulleton* (c), and *The Attorney-General v. Stephens* (d).

Mr. Cairns, Q. C., and Mr. Toller, for the Defendant *Sarah Hastings*, and Mr. W. W. Cooper, for the infant Defendants, contended that the evidence did not shew that the 2 a. 3 r. ever formed part of the manor; and even if it did, they disputed the Plaintiffs right to a decree, on the ground that the confusion of the 2 a. 3 r. with the rest of the land sold by the trustees in Lot 11, was owing to the negligence of the testatrix through whom the Plaintiff claimed. The Court would leave the Plaintiff to his remedy, if he was entitled to any, at law.

Mr. Amphlett for the Defendant *Secker*.

Mr. Rolt, Q. C., in reply.

VICE-CHANCELLOR.—The peculiarity here is, that the

(a) 3 D. M. G. 792.

(b) 4 Ves. 180.

(c) 2 Ves. & Bea. 268.

(d) 1 K. & J. 724, and cases there cited.

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determination of the question in your favour would not bind the party entitled in remainder expectant upon the determination of the term of 1567.

Mr. Rolt.—That circumstance cannot deprive the devisees of the right in the interim to have the question determined as between themselves and those claiming under them.

Judgment reserved.

July 13th.
 —
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I cannot do better than to preface my judgment in this case by repeating the observations of the Lord Chancellor in the cause of *Hicks v. Sallitt* (a), as to the discretion which the Court is called upon to exercise in a case where, as here, it is almost impossible not to have a strong leaning in favour of Defendants who are in possession of property purchased so long ago :—" Parties filling such a position ought not certainly to be disturbed, unless a clear case be made out against them ; but when such a case is made out it is the duty of the Court to decide in favour of the Plaintiff without displeasure against him for asserting what the result shews to be his legal right."

As to the merits of the particular point now urged, there can be no reasonable ground for doubt. The Plaintiff shews that the 2 a. 3 r.—the piece of land now in question—was clearly parcel of the manor in 1793. He makes out a clear *primâ facie* case that his land was conveyed to *Smith Hastings*, through whom the Defendants claim ; and that *Hastings* took his conveyance with full notice, on the title

deeds, of the limitations under which the Plaintiff has become entitled.

To rebut that *prima facie* case, the Defendants seek to raise a doubt as to the identity of the roads by which the property is described as bounded.

[His Honour stated the evidence on this subject, and held that this doubt was unfounded.]

It was argued, that I ought not to direct a reconveyance as prayed by the bill, but to leave the Plaintiff to his remedy at law. Now, the course at law is this. The Plaintiff points out the land, and the sheriff delivers possession of the land so pointed out; and if he delivers too much the Court sets that right by summary relief: but in a case like the present, the Court could not afford such summary relief. Consequently, to leave the parties to their remedy at law, would, in this case, be to deprive the Plaintiff of any remedy.

This is not the ordinary case of confusion of boundaries. The testatrix having 6 a. 1 r. 24 p., which is partly freehold, partly leasehold, devises the freehold part to the Plaintiff, and the leasehold part to trustees for sale. The trustees undertake to discharge that trust and proceed to sell. It then became the duty of the trustees to see that the leasehold part, and no more, was comprised in the conveyance to the purchaser, and the duty of the purchaser to do the like. It is true that the testatrix was the party to blame for the confusion of the freehold land improperly sold by the trustees with the leasehold. But in reference to that argument, *Clarke v. Yonge (a)*, which was referred to in

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(a) 5 Beav. 523.

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Hicks v. Sallitt, appears to me to have a material bearing. There the Plaintiffs were entitled to an advowson, and were also entitled as impropriators, although ignorant of their rights in that respect, to a portion of the corn tithes. The Defendant, as rector of the parish, was also entitled to a portion of the corn tithes, but from the time of his collation he had received the whole. In this state of things an award was made, and afterwards confirmed, by which all the tithes were commuted for a gross sum, the whole of which was to be paid to the rector and his successors. To this award the Plaintiffs as patrons had assented: through their neglect the whole became mixed together and confused; and accordingly, when they came to file their bill, seeking to establish a claim to their proportion of the rentcharge, it was contended that they were concluded by the award to which they, as owners of the advowson, had consented. But Lord *Langdale* did not take that view of the case. After holding, upon the preliminary question, that the Plaintiffs were entitled to a portion of the corn tithes, and that the portion to which they were so entitled was a moiety, he said this:—"The case is attended with considerable difficulty; but on the best consideration which I have been able to give to the Act, I think that the Plaintiffs are not precluded from seeking to establish in this Court a claim to a portion of the rentcharge commensurate with the proportionate value of their portion of tithes, which was a part of the consideration for which the rentcharge was given" (a).

There, the property in question being a mere money charge, the decree was comparatively easy to frame. Here, I can only deal with the case by way of inquiry.

I must declare, that the Plaintiff is entitled to the 2a. 3r.

(a) *Id.* 538.

described as freehold in the particulars of sale, and constituting part of Lot 11; there will then be a decree for the Plaintiff, as in *Hicks v. Sallitt*, comprising a direction that all the Defendants join in the conveyance of the property in question to the Plaintiff, and a declaration that the Plaintiff is entitled to the rents and profits received by the Defendants, or any of them, or by *Smith Hastings*, deceased, since the 1st of June, 1831, in respect of the 2 a. 3 r. Then there will be an inquiry in what part of the 6 a. 1 r. 24 p. comprised in Lot 11, the 2 a. 3 r. are situate; and who has been in possession of the same; and a declaration that if it shall appear that the 6 a. 1 r. 24 p. have been held at one rent, the Plaintiff is entitled to a proportional part in respect of the 2 a. 3 r. as against the Defendant *Sarah Hastings*, reserving the question, as between her and *Secker*, of *Secker's* liability.

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My difficulty as to *Secker* is this, that I am not sure that what was conveyed to him by *Smith Hastings* comprised any part of the 2 a. 3 r. in question; but I am clear that the conveyance to *Smith Hastings* comprised the whole.

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July 1st, 2nd,
& 9th.

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Copyright
—*Piracy*
—*Injunction*
where part
only objec-
tionable.

If any person by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena,

whether such explanations and answers are furnished by his own recollection of his former general reading or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is sufficient to constitute an original work, of which the copyright will be protected.

But another person may originate another work in the same general form, provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it.

In determining whether an injunction should be ordered, the question, where the matter of the Plaintiff's work is not original, is, how far an unfair or undue use has been made of the work.

Instances of unfair or undue use, and the contrary, in works of this description.

If, instead of searching into the common sources and obtaining your subject matter from thence, you avail yourself of the labour of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use.

Falsely to deny that you have copied or taken any idea or language from another work, strong indication of *animus furandi*.

Notwithstanding *Bell v. Whitehead* (3 Jur. 68), if the Court is led to the conclusion that there has been piracy, it will not grudge any labour that may be requisite in order to ascertain how far the injunction should extend.

Form of injunction where certain distinct parts of a work like the above are unobjectionable and others contain piracies.

THE Plaintiffs were the publishers of a work written by Dr. Brewer, called "The Guide to Science," the purpose of which was to explain upon scientific principles, and by means of questions and answers arranged in the form of a systematic course of instruction, some of the ordinary phenomena of nature, for the benefit of young persons and others who have not received a scientific education.

The Defendants were the publishers of a book called "The Reason Why," purporting to be written by a Mr. Philp, the general scope and design of which was similar to that of the Plaintiffs; and in which, as in the Plaintiffs', the instruction was given by means of questions and answers, arranged under heads, and in the form of a systematic course.

The bill was for an injunction to restrain the Defendants

from publishing, selling, or disposing of any copies or copy of "The Reason Why."

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—
Statement.

The Plaintiffs contended, that Dr. *Brewer* was to be considered as the first person to whom it had occurred to explain, in the form of question and answer, the familiar phenomena of life. They therefore insisted, that the whole of the Defendant's book was an infringement of their copy-right. At the same time they set out particular questions and answers contained in the Defendant's book, which they alleged to be copied or merely colorably altered from their own.

Philp filed an affidavit, in which he admitted that he had taken suggestions from Dr. *Brewer's* book as to the authorities to be referred to in compiling a work like his own. He met the specific charge of the Plaintiffs as to having copied or merely colorably altered the particular questions and answers set out in their affidavit, by referring generally to other works where the same subjects were discussed; but did not account for patent resemblances between his own book and the Plaintiffs', by saying that he took the question or the answer from any of such common sources. He then denied that he had copied or taken any idea or language from the work of Dr. *Brewer*.

The Defendant's book was in two parts, and arranged in lectures. No specific objection was raised to the second part, or to the first lecture of the first part. The two books were perfectly dissimilar in form, size, and illustration.

It appeared that the Plaintiff Dr. *Brewer* had been in the habit of collecting for a long period the inquiries he had heard made by very many persons, and of soliciting other inquiries from persons of observant habits and familiar

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with common phenomena; and had noted down such inquiries from time to time; that he had collected other questions from books; and that the inquiries and questions so collected by him, with answers furnished partly from his own information, partly by consulting particular works for that express purpose, formed the materials of his work.

Argument.
—

Mr. *Rolt*, Q.C., and Mr. *Karslake*, now moved for an injunction as prayed by the bill.

Mr. *Cairns*, Q.C., and Mr. *J. Hinde Palmer*, for the Defendants, denied that copyright could exist in a work of this description. Confessedly, there was no originality in the scientific principles enunciated. As little was there in the form of the work: questions and answers having been employed in many other instances to explain familiar phenomena of nature upon scientific principles. Neither was there originality in the particular questions or answers in the Plaintiffs' book; for, with regard to the questions, some had been contributed in answer to advertisements published by Dr. *Brewer* for the purpose, so that the copyright, if any, would, as to these, be in the persons by whom they were contributed, and the rest were what he heard asked by others, or got from books; and as to the answers, they were readily obtained from sources of information common alike to both authors. The originality, if any, was confined to the arrangement, and that was not alleged to have been infringed.

Assuming, however, that the work was one in which there could be copyright, here there had been no infringement. The similarity of which the Plaintiffs complained was accounted for by the vast variety of common sources from which such information can be derived. It did not

prove that there had been copying or any unfair use of the Plaintiffs' work: *Murray v. Bogue* (a); and even where there has been clear copying, and a copying of errors, if confined merely to extracts or particular passages of the Plaintiffs' work, this Court is in the habit of refusing an injunction, upon the ground that the litigation of such minute inquiries injuriously occupies the time of the Court to the exclusion of more important business: *Bell v. Whitehead* (b). The inclination at the present day is rather to restrict than to increase injunctions in such cases before the establishment of the legal title, and to give increased weight to the question which side is most likely to suffer by an erroneous judgment, and to the prejudicial effect an injunction may have on the trial of the action: *M'Neill v. Williams* (c).

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Mr. Rolt, Q.C., in reply, referred to *Lewis v. Fullarton* (d), as showing that an injunction ought to be granted, although the piracy was confined to extracts, and without waiting till the pirated parts could all be ascertained.

The VICE-CHANCELLOR said, he must take time to examine the books more minutely. He was satisfied that the Defendant *Philp* had taken portions of his book, and no inconsiderable portions, although perhaps in detached pieces, from the Plaintiffs' work; and it was very greatly to be regretted that he had not stated candidly at once how much he had taken. Much of the matter, however, and much of the labour was his own. Even the process of altering and transposing the Plaintiffs' questions and other matter must have been laborious. Still, with much matter of his own, he had intermixed a very considerable quantity of the Plaintiffs'. And the question for the Court to deter-

(a) 1 Drew. 353.

(b) 3 Jur. 68.

(c) 11 Jur. 344.

(d) 2 Beav. 6.

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mine—a question always of great nicety—was, whether the quantity so taken, on such a subject, was sufficient to justify an injunction, and, if so, to what extent the injunction was to go. The investigation had already proved exceedingly laborious, and would be so whenever it was resumed. All the books referred to as common sources must be examined.

Judgment reserved.

July 9th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD (after stating the object of the motion)—

The case made by the Plaintiffs is, that they are the publishers of a work written by Dr. *Brewer*, called "The Guide to Science," which has now passed through eleven editions, the character of which it is necessary in the first instance to state, because it was argued—although it appeared to me to be in vain to attempt to raise such an argument—that the work was one in which there could be no copyright.

The work does not lay claim to any originality with reference to the scientific doctrines contained in it. The author does not profess to have made any discovery in science, or to do more, in the work in question, than to provide for the young, and other persons who have not been in the habit of making observations for themselves information by which some of the ordinary phenomena of common life may be explained to them on scientific principles, and they may themselves be led to observe and to reflect upon those wonderful laws of nature, by which the most ordinary phenomena are governed.

Such being the purpose and object of the work, the author tells us he composed it in this way: He says, he was indebted in some degree to other works; but that he was in the habit also of collecting for a long period the inquiries that he heard made by very many persons, and even of soliciting inquiries from persons of observant habits and familiar with common phenomena; that he noted down such inquiries from time to time in a note book; and that the inquiries so collected by him, with answers furnished partly from his own information, partly by consulting particular works for that express purpose, form the material of the work in question.

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That an author has a copyright in a work of this description is beyond all doubt. If any one by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected. Therefore, I can have no hesitation in coming to the conclusion that the book now in question is in that sense an original work, and entitled to protection.

The next question is, to what extent a work of this description is entitled to protection, regard being had to the obviously common sources from which the answers to the questions it contains may be collected, and, I may add, to the common subjects by which many of the questions may be suggested. In reference to this question, it ap-

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pears to me that the Plaintiffs' work partakes of the character of a class of books as to which questions of copyright have been often before the Court, namely, dictionaries of art and science, encyclopædias, and the like, although it is of a humbler character than an encyclopædia. I cannot concur in the view taken by the Plaintiffs' counsel, that Dr. *Brewer* can be considered as the first person to whom it has occurred to explain in the form of question and answer the familiar phenomena of life. Several recent books of that character have been referred to by both parties to this suit; and I might go further back and refer to the various books in which scientific information is conveyed in the form of dialogues. It is clear, that, whether the form of dialogue or that of question and answer be adopted for the purpose, there is no such originality in the construction of a work like the present as to prevent another person from originating another work in the same general form, provided he does so from his own resources, and makes the work he so originates a work of his own by his own labour and industry bestowed upon it. Therefore, so far as the general character of the work is concerned, it is impossible to say that the mere circumstance of the Defendants' book being constructed in a similar general form amounts to the slightest evidence of a fraudulent intention on the part of the composer to injure the Plaintiffs.

The really difficult question in cases of this description, where it must be admitted that the matter is not original, is how far the author of the work in question can be said to have made an unfair or undue use of previous works protected by copyright. As regards all common sources, he is entitled to make what use of them he pleases; but, as Lord *Langdale* said in *Lewis v. Fullarton*(a), he is

(a) 2 Beav. 6.

not entitled to make any use of a work protected by copyright which is not what can be called a fair use.

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As regards the question of fair use of the Plaintiffs' work, the Defendant to a great degree prevents inquiry. He says broadly in his affidavit, "I deny that I copied or took any idea or language from the work of Dr. *Brewer*." Upon a broad statement of that description, the question of fair use is almost excluded. He does not say, he has not read the work of Dr. *Brewer*. He says he has not read the second edition, or seen the eleventh edition; and that he never read the preface—a denial which, of itself, raises an inference that he had read the body of the work: and he denies that he has taken any idea or language from it.

The only uses consistent with that statement on the part of the Defendant would appear to be these: In publishing a work in the form of question and answer on a variety of scientific subjects, he had a right to look to all those books which were unprotected by copyright, and to make such use of them as he thought fit, by turning them into questions and answers. He had also a further right, if he found a work like Dr. *Brewer's*, and, perusing it, was struck by seeing—as I think has been the case in the present instance—that the author had been led up to particular questions and answers by the perusal of some other work, to have recourse himself to the same work, although possibly he would not have thought of doing so but for the perusal of the Plaintiffs' book. Both these, I apprehend, would be perfectly fair and legitimate modes of using the Plaintiffs' book; and neither would be inconsistent with Mr. *Philp's* affidavit, that he has not copied or taken any idea or language from Dr. *Brewer's* book.

There is another sort of legitimate use which might fairly be made by Mr. *Philp*, although it is scarcely so

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consistent with what he has deposed to in his affidavit. It would be a legitimate use of a work of this description if the author of a subsequent work, after getting his own work with great pains and labour into a shape approximating to what he considered a perfect shape, should look through the earlier work to see whether it contained any heads which he had forgotten. For instance, it was said—whether accurately or not I have not thought it material to inquire—that, in reference to the several modes by which heat diffuses itself, the books to which the Defendant refers as common sources mention only “radiation, conduction, and absorption,” and make no mention of “convection”—a term found only in the Plaintiffs’ book until taken thence by Mr. *Philp*. He might say he had forgotten “convection,” and therefore add it to his book. But surely no one would say with regard to a subject of so general a description that this would be an unfair use of the Plaintiffs’ book, provided, upon adding the word to his own book, he used his own mind to explain what “convection” is, and explained it in his own language. So far, there could be no difficulty if the case rested there.

The question I really have to try is, whether the use that in this case has been made of the Plaintiffs’ book, has gone beyond a fair use. Now, for trying that question, several tests have been laid down. One which was originally expressed, I think by a Common Law Judge, and was adopted by Lord *Langdale* in *Lewis v. Fullarton*, is, whether you find on the part of the Defendant an *animus furandi*—an intention to take for the purpose of saving himself labour. I take the illegitimate use, as opposed to the legitimate use of another man’s work on subject matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and

arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colorable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use. That Mr. *Philp* has made this use of the Plaintiffs' book to a certain extent I find to be clear. The extent to which he has done so is another subject of consideration with regard to the injunction. But, as I said at the close of the argument, I have come, with great regret, to the conclusion that the statement in his affidavit denying that he has taken any idea or language from the work of Dr. *Brewer* is wholly inconsistent with any conclusion I can arrive at, after looking at the numerous passages to which I have been referred. I extremely regret that he did not take the frank and candid course of stating how he had used the book. Had he done so, the case very possibly might now wear a different aspect. But it is a strong feature in the case, as to the animus with which the copying is made, when I find a positive denial of any idea or language having been copied or taken, and am yet compelled to come to the conviction, that, however the Defendant may satisfy his own conscience, no other person can reconcile that denial with the facts developed by a comparison of the works in question.

[His Honour then gave several instances in which the Plaintiffs' work had been unfairly used by Mr. *Philp* in the sense defined above, and proceeded:]

The conclusion at which I have clearly arrived is this— not that you do not find in a variety of other books many

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of the subjects which Mr. *Philp* has discussed, either in the form of statement or in the form of question and answer, but that you do not find them in the collocation and phraseology in which they are found in Dr. *Brewer's* book, or, what is worse, with only a colourable variation, ingeniously and purposely introduced in collocation and phraseology; and that a quantity, and a considerable quantity, on the whole, of the Defendant's book has been thus taken from that of Dr. *Brewer*.

The next question is, what course the Court should adopt where it appears that the piracy complained of extends only to about one-half of the Defendant's book. In the present case, one-half of the Defendant's book is admitted by the Plaintiffs to have nothing to do with their book; and there is much more of the latter as to which I think the Plaintiffs take an exaggerated view, in insisting that it has been pirated; and, that being so, the question which weighed most on my mind, and which made it necessary for me to go through the whole of the books of the two authors was, how far, regard being had to the authority of *Mawman v. Tegg* (a), I ought to deal with this case by way of injunction.

In *Mawman v. Tegg*, Lord *Eldon* began by adverting to an attempt that had been made in the argument to establish that the alleged piracy was intended to imitate the Plaintiffs' work in form and outward appearance. In the case before me there is no charge whatever of that kind. The two books are perfectly dissimilar in form, size, and illustration. The respectable publishers are wholly free from that charge, and the blamelies with the writer they have employed. I consider, therefore, as Lord *Eldon* considered in *Mawman v. Tegg*, that that part of the case cannot in any way be

(a) 2 Russell, 385.

seriously adverted to. After this, Lord *Eldon* says he is very anxious to know what degree of copying there had been in the case before him. He says, "The persons in the employment of the Defendant can state exactly how much they copied, and what parts they copied, and can supply the Court with the knowledge of how the fact really stands, without leaving it to be collected from inferences more or less strong." I have already expressed my great regret that Mr. *Philp* has not taken that course. It is impossible for me now to ask him for an affidavit stating how much he has copied, when he has already filed an affidavit denying that he has taken a single idea from the Plaintiffs' book. Had he taken a different course in this respect, it might possibly have put the case in a different position. The Defendant in *Mauwman v. Tegg* took a different course, and made an affidavit stating that out of 227,000 lines 2,160 lines, or somewhere about a hundredth part of the whole, had been copied. The Lord Chancellor felt so much difficulty on the case, that he ultimately sent a reference to the Master to investigate the matter; but he makes these observations as to what ought to be done about the injunction. He says, "It appears to have been Lord *Hardwicke's* opinion that an injunction might be granted against the whole, although only part was pirated; and in the instance of *Milton's Paradise Lost* with *Newton's* notes, although there was nothing new in that book except the notes, he was of opinion that he could grant, and did grant, an injunction against the whole book. There is a case of an action tried before Lord *Kenyon*, in which a motion was afterwards made for a new trial; and there Lord *Kenyon* states that the question, whether you could grant an injunction against the whole of a book on account of the piratical quality of a part, came before Lord *Bathurst*; and Lord *Bathurst* seems to have held, that you could not do so unless the part pirated was such that granting an injunction against that part necessarily destroyed the whole.

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Lord *Kenyon*, who possessed great information on this subject, states himself to have been perfectly satisfied with the opinion of Lord *Bathurst* as bearing upon the judgment of Lord *Hardwicke* and the other cases. In the case before Lord *Kenyon*, the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord *Kenyon's* direction to the jury seems to have been, to find damages for publishing the part only." Then Lord *Eldon* says, "The difficulty here is this, whether I have before me sufficient grounds to authorise me to say how far the matter which is proved (if I may use that word) to have been copied, is sufficient to enable me to decide how much I may injoin against. And if I can be thus authorised to say how much I can injoin against, then the question is, what will be the effect of that injunction applied to so much of the work in the state of uncertainty in which we now are? Or whether, on the other hand, as the matter cannot be tried by the eye of the Judge, I must not pursue a course which has been adopted in cases of a similar nature, namely, refer it to the Master to report to what extent the one book is a copy of the other."

In the previous part of the hearing he had said, "There is no doubt, if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion."

In *Lewis v. Fullarton* (a), Lord *Langdale* came to the conclusion that a considerable part of the Plaintiff's work had been pirated; and though he could not say how much had been so, yet he inferred from what was already in evidence, that the result of further investigation applied to other parts of the work would be similar. He referred, also, to Lord *Eldon's* observations in *Mawman v. Tegg*, that

(a) 2 Beav. 6.

it was the business of a Defendant, when a considerable part of a work is shown to have been pirated, to separate and point out all that has been pirated, and he granted an injunction as to the entire work.

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It seems to me, that the present case is one which differs to a considerable extent both from *Mawman v. Tegg*, and from *Lewis v. Fullarton*. Here it is as if the book in question had been published in parts. Had the last part alone been published, there would have been no ground for interfering at all. In the first lecture, as it is called, in the Defendants' book there is nothing of which the Plaintiffs complain. The fourth lecture, and all those subsequent to the twenty-fifth, I have carefully examined; and though here and there they contain passages of which the Plaintiffs complain, I find nothing which can reasonably be objected to, as shewing that the writer has made an unfair use of the Plaintiffs' book. The second lecture contains piratical matter; and as to the rest, between that and the twenty-fifth, some contain passages which appear to me, after carefully reading through them, to have been evidently taken from the Plaintiffs' book; and the remainder contain passages which have a resemblance, although I should not have been satisfied in dealing with the latter had they stood alone.

It appears to me, therefore, that I shall be doing complete justice if I restrain the Defendants, as I consider that I am bound to do, from publishing the second lecture, the third lecture, and the fifth and following lectures, down to and including the twenty-fifth of the Defendants' book. Adopting the words used by Lord Langdale in *Lewis v. Fullarton*, the injunction will restrain the Defendants from publishing a book called "The Reason Why," containing the lectures I have mentioned; and then it will add, "or any passages or passage copied, taken, or colorably altered from the book called 'The Guide to Science,' in the Plaintiffs' bill mentioned."

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I have not forgotten the case before Lord *Cottenham* (a), in which he speaks of the labour thrown upon the Court in analysing minutely cases of the description then before him, and says that justice did not require such an analysis. But it seems to me, that if I am necessarily led to the conclusion that there has been piracy, justice does require that I should not grudge any labour that may be requisite in order to ascertain how far the injunction should extend. Neither have I forgotten that of *M'Neill v. Williams* (b), where, notwithstanding seven common errors in a work containing calculations, Lord Justice *Knight Bruce*, when Vice-Chancellor, held, that although great suspicion was thrown upon the Defendant's case, yet, balancing all the circumstances of convenience and inconvenience, it was not right to grant an injunction. Nor have I forgotten the recent case of *Murray v. Bogue* (c), in which Vice-Chancellor *Kindersley* refused an injunction. In the case before me, not only have I the fact of my arriving at the conclusion that there has been close copying or colourable alteration of the Plaintiffs' book; but I have also this strong fact, and I confess I rely upon it as one that ought to have a considerable bearing upon my decision, that Mr. *Philp* has taken upon himself to deny by his affidavit that he has copied or taken any idea or language from the Plaintiffs' book. I find it impossible to come to a conclusion in his favour on the issue he has so tendered; and that being so, the very circumstance of that denial on his part is a very strong indication of an *animus furandi*; and if the *animus furandi* be established, I ought to interfere by injunction.

The Defendants are, of course, entitled to say that the Plaintiffs must be put upon terms of bringing an action against Mr. *Philp*; and although they may waive it if they

(a) *Bell v. Whitehead*, 3 Jur. 68.

(b) 11 Jur. 344.

(c) 1 Drew. 353.

think fit, I shall not leave it to the Defendants to require the Plaintiffs to do so, but shall insert it as part of the order.

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ORDER that Plaintiffs do bring such action against the Defendants as they may be advised for the publication of the book called "The Reason Why" in the Plaintiffs' bill mentioned. And that they undertake to abide by any order that this Court may make with reference to any damage occasioned by this order in the event of the jury finding in favour of the Defendants.

And upon Plaintiffs undertaking to bring such action, restrain Defendants from publishing the book called "The Reason Why," containing the Lectures numbered 2, 3, and from 5 to 25 both inclusive, or any passages or passage copied, taken, or colourably altered from the book called "The Guide to Science" in the Plaintiffs' bill mentioned.

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BY Acts of Parliament passed in the years 1845 and 1846, the *Leeds and Thirsk Railway Company*, since incorporated as "the North Eastern Railway Company," was authorised to raise money by the creation of shares or

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By a railway company's Act, after reciting that the company had issued certain "preference shares," on the terms of the holders thereof being entitled to "fixed preferential dividends thereon, payable out of the revenues of the company," at certain rates in the Act mentioned, it was enacted, That the income of the company, from time to time applicable to the payment of interest on moneys borrowed and dividends on shares, should be applied, first, in payment of the interest, from time to time accruing, on mortgages and bonds; next, in payment of the preferential dividends on the several classes of preference shares, in the order in the Act specified; and, lastly, in payment rateably of dividends on original shares. The contracts upon which the preference shares had been issued and taken up (irregular in themselves but rendered valid by the Act) were to the effect that such preference shares should be entitled, some to a dividend at a certain given rate per cent. for a given number of years, and at a lower given rate in perpetuity thereafter; others to a given rate per cent. without restriction as to time; and others at a given rate per cent. for a term certain, and thereafter until such time as they were redeemed by the company:—*Held*, that, coupling the enacting part of the Act with the recitals in its preamble, and having regard to the contracts upon which the shares were issued, the holders of such preference shares were entitled, according to their priorities *inter se*, to arrears of former dividends before any dividend could be paid to the holders of ordinary shares; for the word "dividend" is not, *ex vi termini*, restricted to profits accruing during any given period; and here, the consequences of so restricting it would be to enable the holders of ordinary shares so to arrange the declaration of their dividends as to prevent the holders of preference shares from deriving any of the advantages for which they had stipulated.

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stock, to be considered as part of the general capital of the company, and also to borrow further sums of money as therein mentioned.

None of these Acts authorised the creation of shares or stock having any preference over the ordinary shares or stock of the company.

In the year 1848 three Acts of Parliament were passed, by which the company was authorised to borrow further sums of money, and to raise certain specified sums by the creation of new shares or stock, to be considered as part of the general capital of the company; but by each of these Acts it was provided, that, in the creation of such new shares or stock, it should not be lawful for the company to guarantee any interest or give any preference in the receipt of dividend upon or in respect of such new shares or stock.

After the passing of the three last-mentioned Acts, it was resolved by the company, "that, instead of raising by loan some of the money which by the said Acts they were authorised to borrow, the same should be raised by the creation of certain preference shares;" and, accordingly, at a special general meeting held on the 7th of October, 1848, a resolution was passed, that, in pursuance of the powers contained in "The Companies Clauses Consolidation Act, 1845," and in the above-mentioned special Acts of 1845 and 1846, it should be lawful for the directors to raise, by creating new shares, upon the terms and conditions and in the manner thereafter mentioned, and in augmentation of capital, such sums of money as were by the before-mentioned Acts authorised to be borrowed. Of these conditions, the first and second were as follows:—"First, that such new shares be of the nominal value of 12l. 10s. each, and be denominated preference quarter

shares ; second, that such preference quarter shares shall be entitled to a dividend at the rate of seven per cent. per annum for the period of three years, and of six per cent. per annum in perpetuity thereafter on the amount actually paid up."

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In pursuance of these resolutions more than 10,000 preference quarter shares, afterwards called "First Preference Shares," of the nominal value of 12*l.* 10*s.* each, were issued and taken up.

By an Act passed in the year 1849, the company was authorised to raise further sums of money for the completion of their works. This Act contained the following clauses:—Sect. 2. That, for the purpose of enabling the said company to complete the railways and works by the said recited Acts authorised, it shall be lawful for them to raise the sum of 450,000*l.*, or any part thereof, by the creation of new shares or stock in addition to the sums of money which they are authorised to raise by their former Acts; and the new shares or stock to be created by virtue of this Act, shall be considered part of the general capital of the company; and the shares so to be created shall be of such amount, and shall be issued at such times, in such manner, and to such persons, and with such priority in the payment of dividends in preference to the holders of other shares in the company (except as hereinafter mentioned) not exceeding after the rate of 7*l.* per cent. per annum upon the nominal amount thereof, and with such other rights and privileges as any general meeting of the company specially convened for the purpose may determine: Provided always, that all and every part of such sum of money so to be raised shall be applicable only to the objects and purposes by this Act authorised. Sect. 3. That any priority in the payment of dividends which may

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Class 1 consisted of 3,459 shares, afterwards called "The Third Preference Shares," on which the sum of 33,658*l.* had been paid up, and which, by virtue of the resolutions of the 25th of August, 1849, were entitled to a preferential dividend of 6*l.* per cent. per annum for the first three years, and 5*l.* per cent. per annum in perpetuity thereafter.

Class 2 consisted of 41,541 shares, afterwards called "The Fourth Preference Shares," created under the following circumstances, but of which only 15,325 were issued:—The directors finding it impossible to get all the preference fifth shares taken up on the terms originally proposed, determined to vary the terms as to those remaining unissued, and at a special general meeting of the company, held on the 16th of September, 1850, it was resolved—

1. That so many of the preference fifth shares created by the shareholders' resolutions of the 25th of August, 1849, under the provisions of the Act of 1849, as had not been issued under those resolutions, should be again offered to the shareholders in the proportion of one preference fifth share to every 40*l.* of nominal capital held by them.

2. That such shares as should be taken up by the shareholders in compliance with these resolutions should (subject to the payment of the dividends on the then existing preference shares) be entitled to a preference dividend of 7*l.* per cent. per annum for seven years certain from the 1st of October then next, on the capital from time to time paid up on them, and until such time as they should be redeemed by the company, which was to have the option of paying them off at par at any time after the expiry of the term aforesaid, upon notice being given to the holders.

3. That, in redeeming or paying off at par the said shares, the directors were empowered to redeem or pay off all or any part of such shares from time to time as they

should think expedient, selecting the shares so to be re-deemed or to be paid off by ballot in such form as they should think proper."

By "The *Leeds* Northern Railway Act, 1851," the name of the company was changed, and it was thenceforth incorporated by the name of "The *Leeds* Northern Railway Company." The preamble of this Act, after reciting the earlier Acts of the company, proceeded in these words:—"And whereas the powers of the company, under the recited Acts or some of them, to issue shares are unexecuted to the aggregate amount of 367,250*l.*, and to borrow money are unexecuted to the aggregate amount of 129,944*l.* 10*s.* : And whereas some of the shares, to the aggregate nominal amount of 125,937*l.* 10*s.*, have been issued on the terms of the holders thereof being entitled to a fixed preferential dividend thereon payable out of the revenues of the company, such dividend being after the yearly rate of 7*l.* in the 100*l.* for three years from the 2nd day of November, 1848, and of 6*l.* in the 100*l.* thereafter, and those shares are in this Act distinguished as the 'first preference shares' : And whereas some of the shares, of the aggregate nominal amount of 387,000*l.*, have been issued on the terms of the holders thereof being entitled to a fixed preferential dividend thereon, payable next after the dividend on the first preference shares out of the revenues of the company, such dividend being after the yearly rate of 6*l.* in the 100*l.*, and those shares are in this Act distinguished as the 'second preference shares' : And whereas some of the shares, to the aggregate nominal amount of 34,590*l.*, have been issued on the terms of the holders thereof being entitled to a fixed preferential dividend thereon, payable next after the dividend on the second preference shares out of the revenues of the company, such dividend being after the yearly rate of 6*l.* in the 100*l.* for three years from the 1st day of October, 1849, and of 5*l.* in the 100*l.* thereafter, and those shares

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are in this Act distinguished as the 'third preference shares': And whereas some of the shares, to the aggregate nominal amount of 415,410*l.*, have been created on the terms of the holders thereof being entitled to a fixed preferential dividend thereon, payable next after the dividend on the third preference shares out of the revenues of the company, such dividend being after the yearly rate of 7*l.* in the 100*l.* for seven years from the 10th day of September, 1850, and thereafter, until those shares be paid off by the company, and those shares are in this Act distinguished as the 'fourth preference shares': And whereas some of the fourth preference shares, to the aggregate nominal amount of 153,250*l.* or thereabouts, have been issued, and those shares are in this Act distinguished as 'the issued fourth preference shares;' and whereas the residue of the fourth preference shares, to the aggregate nominal amount of 262,160*l.* or thereabouts, have not been issued, and those shares are in this Act distinguished as 'the unissued fourth preference shares': And whereas the first, second, third, and fourth preference shares, in the aggregate, are in this Act distinguished as 'the preference shares': And whereas, except the first, second, third, and fourth preference shares, there are no other preference shares in the company: And whereas the holders of the other shares already issued, and of the aggregate nominal amount of 1,280,062*l.* 10*s.* are entitled to rateable dividends out of the revenues of the company on the amounts paid up thereon, and those shares are in this Act distinguished as 'the original shares': And whereas the shares created by the company are of various amounts, and it is expedient to facilitate the conversion of all the shares into shares of the same nominal amount, and the conversion into transferable stock of shares fully paid up, and to equalise the rights and privileges of the holders of the shares and stock respectively, having due regard to the amounts paid up, and the rights and privileges of the shareholders entitled to preferential dividends." The 23rd

section of this Act was as follows :—“ That, subject to the provisions of this Act, and to the rights of any mortgagee or holder of any bond or other security, the income of the company, from time to time applicable to the payment of interest on moneys borrowed and dividends on shares, shall be applied as follows, to wit :—1. In payment of the interest from time to time accruing on the principal moneys secured by the mortgages and bonds of the company and for the time being in force, and according to the respective priorities of those mortgages and bonds. 2. In payment of the preferential dividends on the first preference shares, and on any shares issued with like preference in payment of dividends. 3. In payment of the preferential dividends on the second preference shares, and on any shares issued with like preference in payment of dividends. 4. In payment of the preferential dividends on the third preference shares, and on any shares issued with like preference in payment of dividends. 5. In payment of the preferential dividends on the fourth preference shares, whether already issued or hereafter to be issued. 6. In payment rateably of dividends on the original shares and any other shares entitled to the like dividends.” The 24th section empowered the company, if they thought fit, to fix the 25th of March and the 29th of September in every year for the payment of the preferential dividends.

The bill in this suit was filed by some of the preference shareholders on behalf of themselves and all others, except the Defendants, against the company, now incorporated as “The North-Eastern Railway Company,” the directors and secretary of the company, and some of the ordinary shareholders. It stated, that there had been great irregularity in the payment of the dividends on the preference shares—upon all of which dividends remained in arrear or unpaid ; and it prayed a declaration, that the net

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balance at the end of each half-year, applicable to the payment of dividend on the *Leeds* capital stock of the North Eastern Railway Company, ought to be applied—first, in payment of the dividend then accruing due, and the unpaid arrears of former dividends on the first preference shares; and then in payment of the accruing dividend and unpaid arrears of former dividends on the second, third, and fourth preference shares successively, according to their priorities, and before any dividend is paid to the ordinary shareholders; and for an account and payment on that footing; and an injunction to restrain the directors from dealing otherwise with the present or future balances.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Erskine*, for the Plaintiffs, contended, that, according to the true construction of the Acts of Parliament and the former mode of dealing adopted by the company, the preference dividends were a first charge on the net income applicable to the payment of dividends. All arrears of preference dividends must be satisfied before holders of original shares could be paid anything, such dividends being payable out of the revenue of the company for all time and whenever accruing: *Sturge v. The Eastern Union Railway Company* (a). They asked, therefore, for a declaration as prayed by the bill, but waived the accounts and injunction.

Mr. *James*, Q. C., Mr. *Greene*, and Mr. *Hobhouse*, for the Defendants, denied that the preference dividends were payable out of the revenues of the company for all time. The word "dividend" meant the amount which, upon each occasion of declaring and dividing profits, the parties were entitled to receive out of the profits so divided. There its meaning was exhausted. It did not extend to profits

(a) 7 D. M. G. 158.

realised subsequently. A dividend once declared, preference shareholders, of whatever class, were estopped and concluded from asserting any claim which that dividend might fail to satisfy; and the term "arrear," therefore, was inapplicable. The true right of the Plaintiffs was to have the net income of each current half-year (the profits being declared half-yearly) applied in payment of their dividends for that period; if the income so applied proved insufficient to satisfy them, the preference shareholders must abide by the loss; the deficiency could not be made good out of any subsequent earnings.

A reply was not heard.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have carefully read Lord Justice *Turner's* judgment in *Sturge v. The Eastern Union Railway Company* (a); and the conclusion I have come to is precisely that to which, on the reasoning there adopted, that learned Judge would, I think, have come in this case, and appears to me to be founded upon principle.

Judgment.

The Plaintiffs claim to be paid under certain documents, to which I will presently refer, at a certain rate per cent. on the amount of the capital they contributed, or were to be held to have contributed, towards the business of the company. The Defendants admit that the Plaintiffs would be entitled to be paid; but they say the contract was, that they should be paid out of the profits realised at the respective times of declaring the dividend, and out of those

(a) 7 D. M. G. 158.

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profits only. The term "arrear," they contend, is not applicable. The word "dividend," they say, means, at each specific time of declaring the division of profit, the amount that the Plaintiffs may be then and there entitled to receive. The Plaintiffs, on the other hand, contend that they were entitled to be paid out of the general profits of the concern for all time so much per cent. on their shares; and that no ordinary shareholder is entitled to receive anything until they have been paid at that rate.

Upon principle (before considering the matter as applicable to this particular company), suppose a common partnership for a term of years, with a provision in the deed of partnership that the balances should be settled yearly or at any other periods, and the profits then divided, and that *out of the profits so divided* one partner should be paid at a given rate per cent. upon his capital before any other partner should receive anything, that would be one thing; but if the contract were, that the partner in question should have *out of the profits* of the business, which is to last for a certain period, so much per cent. before any other partner should receive anything, I am not clear that the case would then be the same, or that he would not then have a charge on the whole profits to the full amount for which he had stipulated. It is enough for me to say, that it is by no means clear that even in such a case the contest would be in favour of the Defendants.

I will now consider the case of this company; and before examining the resolutions by which these particular shares were created, and the Act sanctioning their creation, there first arises the question, is the word "dividend" to be exclusively applied in the narrow sense contended for by the Defendants. As was said by Lord Justice *Turner*—there is no magic in words, and I must investigate what is meant by the parties to the contract. We all speak of receiving

the dividends of our stock. The word "dividend" does not, by any means, refer exclusively to a share of any particular profits of the concern, the dividend on stock being what the Government has to pay to the Government creditor—a fixed sum in respect of his particular share in the fund subscribed for by contract with the Government.

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Here the concern is a railway company, which is to carry on its business and to be realising profits for ever. The contract of the Plaintiffs is, that they are to receive a preferential dividend, before any other shareholder, out of those profits. Further than that, it seems to me, as I said in *Sturge v. The Eastern Union Railway Company*, when that case was before me, that it is a fallacy to assume that there is a fixed period for making dividends. There is no fixed period for dividing the profits: they are to be divided at such times as the proprietors (the majority of the company) may think fit. They must select some particular days for the purpose; but, subject to that, they may declare a dividend at intervals of two, three, four, or five years, as they think fit, or they may do so at half-yearly meetings. There is no definite period; and, therefore, it becomes more like the case which I first suggested of a person having a charge of so much per cent. on the profits of a partnership, than the instance put to me of a provision that out of the yearly profits he was to receive a certain sum. If the contract had been, that, out of the yearly dividend, or out of the fixed dividend, the Plaintiffs were to receive a certain sum, there would be more to be urged on the part of the Defendants.

The Act itself, *primâ facie*, would seem to raise some ground for a favourable construction of the Plaintiffs' claim. The Act itself, and that to which the Act refers, makes it manifest that it was not intended, that, out of the whole profits in perpetuity, anything should come to the ordinary

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shareholders until those who had the fixed preferential dividends had been satisfied the whole amount of those dividends.

In order to arrive at a conclusion in a manner the most satisfactory to myself, I have followed, in this case, the exact course adopted by Lord Justice *Turner*, in considering the case of *Sturge v. The Eastern Union Railway Company*(a). That was a case in which there were stronger circumstances than exist here in favour of the result at which the Court arrived, but the reasoning in the one applies precisely to the other. There certain shareholders were to have a preference stock, on which 6l. per cent. was to be paid to them. Lord Justice *Turner* observed: "By the first of these Acts, the Act of 1849, the company are to pay dividends to the holders of shares of the 6l. per cent. preference stock before they pay any dividends to the holders of other shares in the company; and, if the case stood upon the enactment alone, there would no doubt be strong ground to contend that the dividends to be paid to the holders of the preference stock, though payable in priority, ought to be taken to be dividends of the same nature and character as the dividends payable to the ordinary shareholders;" that is to say, if there were simply a direction, that, in dividing or paying out of the dividend fund, 6l. per cent. must first be paid to the Plaintiffs, and then the other shareholders must be paid, that would in itself, if there were nothing else in the case, afford strong ground for contending (the learned Judge says no more, because that point was not before him) that the dividend was to be taken in the restricted sense that is here asked for on behalf of the Defendants. His Lordship only says, there would be strong ground for the argument. He does not say more; and there the case supposed did not

(a) 7 D. M. G. 158.

arise. The provision was not in that case, nor is it in this, simply for the payment of dividend at fixed times. Here the recitals in the Act of 1851 are to be coupled with the enacting part. The recitals are, that the preferential dividend is to be payable out of the revenues of the company, which amounts to a^general charge on the whole revenues. The 23rd section enacts, "that the income of the company, from time to time applicable to the payment of interest on moneys borrowed and dividends on shares, shall be applied—first, in payment of the interest from time to time accruing on the principal moneys secured by the mortgages and bonds of the company, and for the time being in force, and according to the respective priorities of those mortgages and bonds; secondly, in payment of the preferential dividends on the first preference shares, and on any shares issued with like preference in payment of dividends." Now, if this is to have the meaning, merely, that, from time to time out of this particular profit fund, and at particular periods, there is to be paid to each party so much as from time to time accrues in respect of his preference share, the same construction must extend to the first payment of interest on mortgages and bonds, as well as the preferential dividends on preference shares; and it must follow, that, from time to time, no part of this profit fund is to be paid in respect of arrears of interest due, but only for any interest which was accruing due during the time in which the dividend accrued; and there would then be great doubt whether that interest could be recovered any otherwise than by a judgment against the company. But I do not think the case rests there, because I concur with the reasoning of the Lord Justice in the subsequent part of his judgment, that I am not to stop at this clause, but must see what the recitals are, and to what they refer; and I find, on referring to the recitals, that the Act expresses that some of the shares, to the aggregate amount of 125,937*l.* 10*s.*, "have been issued on the terms of the holders thereof being entitled to a

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fixed preferential dividend thereon, payable out of the revenues of the company, such dividend being after the yearly rate of 7*l.* per cent. for three years from the 2nd of November, 1848, and of 6*l.* per cent. thereafter, and those shares are in this Act distinguished as the ‘first preference shares.’” In the same way it recites the several other descriptions of shares, and it clearly identifies every one of these shares with the shares which are referred to in the bill, and the history of whose creation is there given, both by their amount, and by reference to the several Acts under which they purport to be created. The scrip certificates contain no mention of 6*l.* per cent., or any other rate of interest: they simply relate to the particular Acts under which the money has been raised. I must therefore look back to the resolutions; and I think, as Lord Justice *Turner* thought in the case I have referred to, that, whatever doubt there may be—and considerable doubt does exist—as to the legality of some of these resolutions before the Act of 1851, yet since that Act recites that the shares have been created under particular resolutions which are there referred to by implication (for there is nothing else with which the recital can be identified), and then enacts that payment shall be made on those shares out of the dividends of the company—however invalid the resolutions may have been originally, I must look back to them, as fixing what the contract for the issuing of these shares must now be taken to be, sanctioned, as the issuing of them has since been, by the Act of Parliament.

The recital in the preamble of the Act of 1851 is, that the preferential dividend is payable out of the revenues of the company, that is, the revenues for all time and in perpetuity. And with that preliminary observation, I will now refer to the resolutions.

The first set of preference shares are certain shares

which were created after the passing of the Act of 1848, and in a very peculiar manner, for it was resolved, that, in pursuance of the Companies Clauses Consolidation Act, 1845, and the several special Acts of 1845 and 1846, "it shall be lawful for the directors, and they are hereby empowered, to raise, by creating new shares upon the terms and conditions and in the manner hereinafter mentioned, and in augmentation of capital, such sums of money as are by the before-mentioned Acts authorised to be borrowed." Some remark was made on that last word. It was argued, that, in truth, in all these cases companies are borrowing the money, although they vest in the lender the right of a shareholder; but it must be such sums of money as are by the before-mentioned Acts authorised to be borrowed. Then the conditions on which the shares were to be created were as follows:—"That such new shares be of the nominal value of 12*l.* 10*s.* each, and be denominated preference quarter shares. That such preference quarter shares shall be entitled to a dividend at the rate of 7*l.* per cent. per annum for the period of three years, and of 6*l.* per cent. per annum in perpetuity thereafter on the amount actually paid up." Now, who, on reading that, would suppose any otherwise than that these shareholders were to have for three years 7*l.* per cent. per annum on the amount paid up, and for ever afterwards in perpetuity on the amount paid up 6*l.* per cent.? Who would suppose that, merely by force of the word "dividend," a different construction was to be intended? that the dividends referred to were not like dividends on stock, not like what many people are in the habit of calling dividends, but were to be a payment out of the profits, if any profits should be made, of 7*l.* per cent. during three years, and at 6*l.* per cent. per annum in perpetuity hereafter. The remarkable point is, that, according to the contention of the Defendants, if at any period of declaring a dividend there happened not not to be in hand enough to pay 7*l.* per cent., but only

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enough to pay 3*l.* per cent. to those shareholders, they are to lose for ever all the rest of the interest then due to them; and yet here the temptation held out is, that, for the first three years, they are to have a higher rate than afterwards. If that is a right construction, the inducement to take these shares should be put in the contrary way. The higher rate of interest should have been promised for the later years, and in the earlier years the lower rate; because it is clear, that the probability was, that the larger income would not be realised in the first years. According to the Defendants' argument, if it happened that for the first three years the company could not make anything like a full dividend, but during that time declared dividends, when such dividends were declared the consequence would be, though the inducement held out to the shareholders was that they should have 7*l.* per cent. for three years, they were not, in truth, to have 7*l.* per cent., but only to take their chance of the company's realising a profit during those three years, which would enable them, at such periodical intervals as the rest of the shareholders might think fit, to pay the preference shareholders, perhaps, instead of 7*l.* per cent., 1*l.* per cent., or perhaps no more than five shillings per share; and they would be for ever estopped and concluded from the moment of that dividend being declared. I apprehend no shares ever went into the market, or were taken up by the public, on the notion that this was the force of the word "dividend," for it is on that word alone that the contention here arises.

That is the first set of shares that are created, and they are called "The First Preference Shares." As I said before, Lord Justice *Turner* expresses a doubt as to the legality of shares being so created under the Companies Clauses Consolidation Act. I think I ought to say that I am not at all determining that point. I only deal with these shares as sanctioned by the Act of 1851, there is

nothing else to which that Act can be referred. The capital was raised on the faith of the resolutions I have mentioned, and the Act of 1851 gave validity to that transaction.

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The next set of shares was created in this way:—An Act was passed in 1849, by which very large powers were vested in the directors for creating new shares. After certain arrangements about interest, by the 8th section it was provided, that, as soon as the original line of the *Leeds and Thirsk* Railway, with such alterations and deviations, and so on, should be completed and opened for traffic, then so much of the previous Acts of 1848 as prevented the creation of preferential shares should be repealed; and then, by the subsequent statute of 1851, large powers were given to the directors for creating, in any mode they should think fit, preferential shares.

It being disputed whether the repeal by the Act of 1849 of the prohibition against creating preference shares was yet operative, the company took upon themselves to decide that it was operative, and commenced, soon after, the creation of certain other preference shares; and the way in which they created them was, that, at a general meeting on the 25th of August, 1849, it was, among other things, resolved "That the shares issued under the powers of the Acts of 1848 be of the nominal value of 20*l.* each." (That is the first creation of what are afterwards called "The Second Preference Shares;" and I must consider this resolution to be that which gives them, as far as a resolution could, validity. I do not think they got their full validity till the Act of 1851.) And then it was resolved, "That, in pursuance of the powers conferred upon the company, and for the purposes authorised by the Act of 1849, the sum of 450,000*l.* be raised by the creation of

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45,000 new shares, of the nominal value of 10*l.* each, to be denominated 'Preference Fifth Shares' " (those are the shares called "The Third Preference Shares" in the Act of 1851). "That such shares shall be entitled to a preference dividend of 6*l.* per cent. per annum for three years, and of 5*l.* per cent. per annum in perpetuity thereafter, subject to the priority &c." [His Honour read the remainder of the resolution.]

Upon that, the same remark may be made as upon the first creation — that the shareholders, having been assured by this resolution, that they were to have for three years certain 6*l.* per cent., would be surprised to hear it said, as soon as the railway was opened, that the company were at liberty to declare a dividend, of which the first preference shareholders would absorb the whole, and for that time the subsequent preference shareholders would have nothing, and would be in truth, as to all those years, in no better position than the other original shareholders who get no dividend at all.

I ought to remark, that, in section 9 of the Act of 1849, there occurs a word on which Lord Justice *Turner* laid some stress in commenting on the several Acts of Parliament in the case of *Sturge v. The Eastern Union Railway Company* (a). The Act of 1849 takes cognisance of some shares having been issued under the three Acts of 1848. They were issued illegally probably, because there was an express clause that there should be no such issue; but the Act of 1849 having repealed that clause in the event of the railway being opened, after noticing that there were in existence some such shares, provides, that, as soon as the repeal takes effect, the "interest or dividends" in respect of such shares shall be paid. It seems to me, that the effect

(a) 7 D. M. G. 158.

of that clause was that which in substance is the real nature of the whole case—namely, that, in speaking of the shares already issued, the words “interest” and “dividends” are synonymous.

Another point occurs as to the preference fifth shares, which is worth observation. The preference fifth shares became divided into two classes—shares issued, and shares not issued. A difficulty arose in issuing them all; the consequence of which was, that the shares issued under the Act of 1851 became “The Third Preference Shares,” and the shares unissued became what are called “The Fourth Preference Shares.” And with regard to these shares, the following resolution was passed on the 16th of September, 1850. [His Honour read the resolution.]

What, then, would be in the contemplation of the parties? The company were about to issue a set of shares. They experienced great difficulty in getting them into the market, except on giving favourable terms; and the terms they offer are these: that, for seven years certain, the persons taking these shares are to have a preference dividend of 7l. per cent. per annum, with a liberty to the company, on account of this burthen, of buying them up at any time. According to the argument of the Defendants, the company might, as to this 7l. per cent., declare a dividend every half-year for two or three years from the starting of the railway, which, instead of giving 7l. per cent. to these shareholders, would give them nothing; and thus, during some years of their contract, without at all incurring any charge of fraud, the company would be able so to arrange their dividends—for instance, by declaring them at the half-yearly meetings—the natural time for the purpose—as that, instead of these shareholders having the 7l. per cent. on their money for three years certain, they would have nothing at all in respect of all that time.

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I cannot conceive that any person taking shares in a company of this kind could have a notion that that was the species of contract he had entered into by force of the word "dividend." I do not think the word "dividend" has in itself, *ex vi termini*, any such meaning as to give the company the power of saying it shall be merely a sum payable out of periodical divisions of the capital of the company. I do not think that is what the parties would contract for. I think the construction an extremely unreasonable one, because it puts it in the power of the original shareholders of the company, who probably in most cases would be the majority of the company, and of the borrowers of the new capital, in order to help themselves out of a difficulty, to say that the provision that the preference shareholders shall have a preference dividend for six years or seven years certain, of a particular sum of money, only means, that, whenever the company choose to declare a dividend, these preference shareholders are to have anything or nothing, according as the state of the funds at that particular time may be, and are to have no charge on the general revenues and profits of the company.

I do not mean to say it is a guarantee in any other sense than this, that these shareholders are to be paid out of the profits of the company. That is the only fund they are to look to. If the company make no profits, they will have no dividend; but I apprehend they are to be paid out of the profits of the company in perpetuity, and I so read the preamble of the Act, which says these shares are to be made payable out of the revenues of the company, not saying the revenues from time to time divisible. I apprehend that the true construction of these contracts is (and I follow the view of Lord Justice *Turner* in saying so), looking at the original contract between the parties as he looked at it in the case before him—looking at the expression "interest or dividends" in one of the Acts of Parlia-

ment—looking also at the charge in the preamble of the whole of these dividends so created on the revenues of the company—that the holders of these preference shares have a charge on the profits for all time at one rate per cent. for a certain period, and at another rate per cent. when that period has expired.

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DECLARE that the net balance which, at the time of the declaration of dividend, is applicable to the payment of dividend on the *Leeds* capital stock of the North-Eastern Railway Company, ought to be applied, first, in payment of the dividend then accruing due and the unpaid arrears of former dividends on the first preference shares, and then in payment of the accruing dividend and unpaid arrears of former dividends on the second, third, and fourth preference shares successively according to their priorities, and before any dividend is paid to the ordinary shareholders. Such declaration to be without prejudice to any application that may be made on behalf of any of the respective classes of preference shareholders with respect to any question of priority amongst themselves. Liberty to apply (a).

*Minute of
Decree.*

(a) See *Henry v. The Great K. & J. 1*), affirmed by the full *Northern Railway Company* (4 Court of Appeal, Nov. 14, 1857.

IN RE UNDERWOOD.

1857.
July 31st.

BY indentures of lease and release, dated 1837, in consideration of 350*l.*, *Loveday* conveyed to *Underwood*, his heirs and assigns, certain freehold lands, "upon the trusts,

Trustee Act
1850—18 & 14
Vict. c. 60, ss.
2 & 15—
"Mortgage"—
"Trust"—

Vesting Order—Conversion.

In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be repaid by a given day, for the borrower, his heirs or assigns; but, in case default should be made, then upon trusts for sale; and the trusts of the purchase money were declared to be for payment of the principal money, interest, and costs, and subject thereto for the borrower, "his executors, administrators, or assigns." Default having been made—*Held*, that the trust of the surplus being for the borrower, "his executors, administrators, or assigns," and not for him, "his heirs or assigns," the deed operated to convert the property as between his real and personal representatives. It was, therefore, more than "merely a security for money"—more, that is, than a "mortgage" as defined by the 2nd section of the *Trustee Act*, 1850 (18 & 14 Vict. c. 60): it was a deed of "trust" within the meaning of the 15th section of the Act; and the lender having died intestate, and it being impossible to find his heir, the Court had power to make a vesting order under that section.

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RE UNDER-
WOOD.

Statement.

and for the ends, intents, and purposes, and subject to the provisos thereafter contained, that was to say, in case the said sum of 350*l.* and interest, as therein mentioned, should be paid to the said *Underwood*, his executors, administrators, or assigns, on or before the 28th of May then next ensuing, then in trust for him the said *Loveday*, his heirs or assigns, and at his or their request and expense to reconvey the said hereditaments and premises to him and them, but in case default should be made," then upon trusts for sale. The trusts of the money arising from a sale were declared to be for payment of the 350*l.* and interest, and all costs and expenses, and subject thereto, for the said *Loveday*, his executors, administrators, or assigns. In a subsequent part of the deed it was declared, that this indenture "should not, nor was it intended to, be considered as or in the nature of a mortgage as between the said *Underwood* and his assigns, but as a conveyance to become absolute in equity as well as at law upon and immediately after any default should be made in payment of the said sum of 350*l.* and interest, or any part thereof."

By indentures of lease and release, dated 1839, *Underwood* being a party to the release, the equity of redemption in these premises was conveyed to *Smeeton*, "subject to the said indentures of 1837, and the said sum of 350*l.*, and the interest thereof secured thereby."

Underwood entered into possession of the premises, and died, in 1849, intestate as to these premises. It was found impossible to discover his heir-at-law.

His personal representatives, being desirous to sell the property, in order to realise the money secured upon it, now presented a petition under the Trustee Act, 1850, praying for an order under the 15th section of the Act vesting the legal estate in the premises in them.

Mr. *Toller* appeared for the petitioners.

Mr. *J. Pearson*, for a mortgagee of the equity of redemption, submitted, that, having regard to the definitions of the terms "trust" and "mortgage" in the interpretation clause of the Act^(a), the deed of 1837 was a mortgage, and not a deed of trust within the meaning of the 15th section. The Act, therefore, did not apply, and the Court had no authority to make the order.

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RE UNDER-
WOOD.
Argument.

No reply.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The difficulty is to say whether the deed of 1837 is, in the terms of the definition of a mortgage in the 2nd section of the Act, "merely a security for money." It appears, that, in the event of a sale, the surplus moneys arising from the sale are directed to be paid to *Loveday*, "his executors, administrators, or assigns," and not to him, "his heirs or assigns." The deed therefore operates to convert the property as between the real and personal representatives of *Loveday*; and that being so, I think it must be held to be something more than merely a security for money; and I shall make the order vesting the legal estate in the premises in the petitioner.

Judgment.

Ordered accordingly.

(a) By the 2nd section of the Act, it is declared that the word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; and that the word "mortgage" shall be ap-

plicable to every estate, interest, or property in lands or personal estate, which would in a court of equity be deemed merely a security for money.

1857.

April 23rd &
28th (a).

RUMBOLD v. FORTEATH.—No. II.

Production of Documents—Discovery—Suit for, by Heir, in aid of Ejectment—Heir at Law—Heir in Tail—Pedigree

The right of the heir at law, and that of the heir in tail, to production of documents upon bill for discovery in aid of an action of ejectment, distinguished.

The principle upon which, in such a suit, the heir in tail is entitled to inspect deeds of settlement creating estates tail, has no application to a suit by the heir at law.

But in a suit of this nature the heir at law is entitled to production of all such parts of deeds and writings admitted by defendants as relate or tend to show his pedigree.

Form of an order for this purpose.

THE Plaintiff claimed as heir at law of *George Lord Ranccliffe*, deceased; the Defendants, as devisees of the real estates of the deceased. The bill was for discovery, to enable the Plaintiff to proceed in an action of ejectment, and for production at the trial of all deeds and writings relating to the real estates in question, or necessary for the purposes of the trial, and for an injunction to restrain the Defendants from setting up outstanding terms, mortgages, incumbrances, or leases (b).

The Defendants, by their answer, admitted the possession of all such of the title deeds and writings relating to the said real estates as were not in the possession of mortgagees; and admitted that there were outstanding terms, but offered not to set up any outstanding term or legal estate on the trial of or in bar to any action of ejectment by the Plaintiff.

The Plaintiff having taken out the usual summons for production of documents, the Defendants, by their affidavits, admitted possession of various scheduled documents relating to the question in the suit, but objected to produce them, upon the ground, that, having regard to their answer, such production was immaterial to the relief to which the Plaintiff was entitled.

The summons having been adjourned into Court—

(a) Report delayed for want of papers. (b) Vide *supra*, p. 44.

Mr. Cairns, Q.C., and Mr. J. S. Moore, for the Plaintiff, now moved for the usual order for production.

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v.
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The rule is, that an heir at law is entitled to come to this Court, not only to have terms removed out of his way, which would prevent his recovering at law, but also to have deeds and writings produced and lodged in proper hands for his inspection, before he has established his title : *Harrison v. Southcote* (a). In the instruments prior to the will the Plaintiff has an equal interest with the Defendants ; they form a necessary part of his evidence in support of his action, as showing the seisin of his ancestor Lord *Rancliffe*.

At all events, the Plaintiff is entitled to production of all such deeds and writings as would tend to prove his own heirship.

They cited also *Lady Shaftesbury v. Arrowsmith* (b).

Mr. Willcock, Q.C., Mr. Rolt, Q.C., and Mr. C. Browne, for the Defendants :—

The only relief sought by the bill is an injunction to restrain the Defendants from setting up outstanding terms, mortgages, and incumbrances. This the Defendants, by their answer, submit not to do. Discovery, therefore, as to such terms, mortgages, and incumbrances is immaterial ; and as to the rest, the Plaintiff, claiming as heir, is not entitled to have them produced in aid of his action. All he is entitled to know is what is comprised in the parcels.

Mr. Cairns, Q. C., in reply.

The VICE-CHANCELLOR said he would take time to

(a) 1 Atk. 540.

(b) 4 Ves. 66.

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 FORTKATH.
 —
Argument.

examine the authorities ; but, as there was nothing in which the Court should be more careful than in making an order for production of documents in aid of an action of ejectment, if any order should have to be made in this case, the Court would take care to limit the discovery to that to which the Plaintiff was strictly entitled.

Judgment reserved.

April 28th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case is, whether the Plaintiff, claiming as heir at law, is entitled to production of deeds and writings, the possession of which is admitted by the Defendants, who claim as devisees of the lands in question, with a view to establish his claim in an action of ejectment brought by him for the recovery of such estates.

I have examined the authorities, and I find that there is a clear distinction taken by Lord *Rosslyn* in *Lady Shaftesbury's case* (a), between applications of this nature made, as there, on behalf of an heir in tail, and applications where, as in *Aston v. Lord Exeter* (b) and *Hylton v. Morgan* (c), the Plaintiff claims merely as heir at law—a distinction noticed by Lord *Eldon* in both the latter cases. Where the Plaintiff claims as heir in tail, he has such an interest in the deed creating the entail that the Court, as against the person holding back that deed, will compel its production : and on that ground it was that the order was made in *Lady Shaftesbury's case*. But the principle upon which that order proceeded has no application where the Plain-

(a) 4 Ves. 66, 72. (b) 6 Ves. 288. (c) Id. 293, 296.

tiff claims as heir at law : and so it was held by Sir *William Grant* in *Jones v. Jones* (a), repeating what Lord *Rosslyn* had said in *Lady Shaftesbury v. Arrowsmith*, that "all the family deeds together would not make the title of the heir at law either better or worse. If he cannot set aside the will, he has nothing to do with the deeds."

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 RUMBOLD
 v.
 FORTREATH.
 Judgment.

In *Aston v. Lord Exeter* (b), Lord *Eldon* points out a further objection to granting production of deeds upon a motion of this nature. He says, it would not only be contrary to the authority of Lord *Rosslyn* in *Lady Shaftesbury's case*, but would, in effect, enable the Plaintiff to proceed at law without the authority and control of this Court. Any such proceeding must be under the authority and control of the Court ; and if the Court made the order for production, the Plaintiff would be able to avail himself of it at law, where the proceedings would be beyond such authority and control.

It was argued in support of this motion, that the Plaintiff has an equal interest with the Defendants in the deeds and writings prior to the alleged will, as forming a necessary part of his evidence of the seisin of his ancestor. But *Bennett v. Glossop* (c) is a direct authority against that contention. There the very same argument was urged on behalf of the heir at law ; but the answer of the Vice-Chancellor was, that no issue was raised as to the ancestor's seisin. "I do not say," he adds, "that, if it appeared that the heir at law would be unable to make out his title in ejectment, without the aid of an instrument under which the Defendant also claimed, by reason that the freehold was in a married woman at the time of her death, or for any other reason, he might not be entitled to a discovery of that trust ; but no case of that kind is made upon the plead-

(a) 3 Mer. 161, 172.

(b) 6 Ves. 288.

(c) 3 Hare, 578.

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 —
Judgment.

ings." So here, I understand that the seisin of Lord *Rancliffe* is not in issue.

My only doubt is, whether, in case any portion of the deeds and writings of which production is sought by this motion tends to show, or relates to, the pedigree of the Plaintiff, he would not be entitled to production of that portion. In *Hylton v. Morgan*(a), where Lord *Eldon* refused, upon motion, to aid the Plaintiff in proceeding at law without the authority of this Court—in which he was followed by Sir *John Leach* in *Barney v. Lockett*(b) and *Northey v. Pearce*(c)—he still says, "as to the pedigree, I apprehend a production would be ordered;" and that is the inclination of my own opinion.

*Minute of
 Order.*
 —

ORDER that Defendants do make and file an affidavit stating whether any and which of the documents mentioned in the schedule to their affidavit, and what part or parts thereof, relate to or tend to show the pedigree of the Plaintiff, with liberty for the Plaintiff to inspect and peruse such of the said documents, or such part or parts thereof as relate to the said pedigree, and to take copies, &c. And that Defendants do produce such documents on the examination of witnesses in this cause, and at the hearing thereof. But Defendants are to be at liberty to seal up such parts of the said documents as, according to such affidavit, do not relate to or tend to show the said pedigree.

(a) 6 Ves. 293.

(b) 1 Sim. & St. 419.

(c) *Id.* 420.

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ADMINISTRATION.

Where a fund, paid into Court in a creditors' suit, has been distributed by mistake among specialty and simple contract creditors to the exclusion of a mortgagee, this Court holds such creditors liable to repay, not *in solido* but *pro rata*; and no creditor will be fixed with liability in respect of the rateable part which the mortgagee may fail to recover from a creditor, who, since sharing in the fund, has become insolvent, or cannot now be found.

Pursuant to a decree in a creditors' suit, real estate was sold, and the purchase money paid into Court. In consideration of such payment, a mortgagee, who was not a party to

the suit, but whose mortgage was noticed in the conditions of sale, executed the conveyance, but the fund was distributed among the other creditors without any payment being made to the mortgagee.

Held, upon bill filed by his personal representative, that the latter was entitled to recover as follows :

(1) From the Defendants who had been paid simple contract debts, the several sums paid to them, the total amount of such sums being less than the Plaintiff's claim.

(2) From the only specialty creditor, so much as might be necessary to satisfy what might remain due to the Plaintiff for principal moneys and interest, after deducting the total amount of the moneys paid to the simple contract creditors, whether parties to this suit or not.

(3) And from the solicitors of the Plaintiff in the creditors' suit, whatever might be necessary to make good any deficiency arising by reason of some of the creditors becoming insolvent, or of others not being to be found, or the like : it being the duty of such solicitors to see that the purchase money paid into Court was properly applied.

Held, also, that the purchasers,

upon payment of the purchase money into Court, had discharged the only condition incumbent upon them, and were relieved from all responsibility as to its application. But the purchaser of the largest lot, having allowed the title deeds to remain with the mortgagee, the bill, as against him, was dismissed without costs.

Held, further, that, although, under the circumstances, the mortgagee's solicitor was chargeable, as between his client and himself, with gross negligence in not placing a stop order on the fund in the original suit, his duties were dehors that suit, in which the primary duty lay with the solicitors of the Plaintiff, who had the distribution of the fund, and that in this suit he could not be made responsible.

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1. A defendant filed an answer in a suit, and thereby referred to a printed document, which was not filed, as an exhibit, and verified the statements in it, and constantly referred to them as part of the answer:—*Held*, that the answer which was filed was incomplete without the printed document, and

that the Clerk of Records and Writs was justified in refusing to file replication to it. *Lafone v. The Falkland Islands Company* (No. 2), 267

2. Except on a motion for decree, answers of Defendants cannot be read as affidavits, upon notice that they will so be used at the hearing; but to make them affidavits, the respective Defendants must confirm their answers by short affidavits referring to them as exhibits. *Barrack v. McCulloch*, 110

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APPORTIONMENT.

Devise in trust for one for life, remainder for his first and other sons in tail, remainder for testator's own right heirs. The devisee for life proved to be heir at law of the testator, and died intestate, and without having had any issue:—*Held*, that, notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a "determination of his interest" within the meaning of the Act 4 & 5 Will. 4, c. 22; and therefore, following *Broune v. Amyot* (3 Hare, 173), the rents were not apportionable between his heir and his personal representative.

Where it can be predicated that the interest mentioned in the 2nd

section of the Act has been determined, the rents and other payments there mentioned shall be apportioned. But where this cannot be predicated, the contest being between the heir and the executor, the heir shall take the whole, and there shall be no apportionment. *In re Clulow's Estates*, 689

ARBITRATION.

Upon a motion to set aside an award, or to refer it back to the arbitrators, the Court will receive evidence by affidavit.

Pending a reference to arbitration, the umpire held a communication with the agents of one of the parties: this fact being known to all the parties at the time, and not objected to by any of them, and the reference having proceeded, and the award having been subsequently made:—*Held*, that it was too late for either of the parties, after the award was made, to object to it, on the ground of such communication between the umpire and the agents of one of them.

The 8th section of the Common Law Procedure Act, 1854, does not authorise the Court to send back the award for reconsideration by the arbitrators on any ground except such as before that statute would have induced it to set aside the award, or to treat it as a nullity in an action brought upon it.

The object of that section was, where any error, formal or otherwise, had occurred which would vitiate the award, to enable the Court to send it back, if they thought fit, to the arbitrators to correct such error, instead of setting the award wholly aside.

If a mistake has been made in the award, not apparent on the face of it, and such mistake is admitted in

an affidavit by the arbitrators, such an admission is sufficient to authorise the court to set aside the award under the former practice, or to refer it back under that statute. So also, if the arbitrators insist that they have made no mistake, but state the principle upon which they made the award, and the Court is of opinion that such principle is not consistent with the reference. *Mills v. The Master, Wardens, and Society of the Mystery of Bowyers, in the City of London; The Master, &c. of the Mystery of Bowyers, &c. v. Mills*, 66

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BANKRUPTCY.

A bankrupt's reversionary interest in a legacy:—*Held*, upon rehearing, (following the authority of the Lords Justices in *Bartlett v. Bartlett*), not to be exempted from the rule as to "order and disposition," by the mere circumstance of such interest being reversionary at the time of the act of bankruptcy.

But to bring such an interest within the operation of the rule, it must be in the order and disposition of the bankrupt "with the consent of the true owner," and where the true owner has no knowledge, nor any means of knowing, of the bankrupt's interest, "consent" on his part cannot be predicated.

Therefore, where a bankrupt, upon the occasion of a previous insolvency, suppressed the circumstance of his being entitled to a reversionary interest, and excluded it from his schedule, and it did not appear that the assignee in insolvency had any knowledge or notice of that circumstance, the latter was held entitled, notwithstanding his title had not been perfected by notice to the trustee; the Court being of opinion, under the circumstances, that there were no laches on his part.

But, *semble*, laches on his part would have been equivalent to "con-

BANKRUPTCY.

sent" within the meaning of the rule. *In re Rawbone's Trust*, 476

BANKRUPTCY, PROVISO FOR FOREITURE IN THE EVENT OF.

See MORTGAGE, 1.

BEQUEST, ABSOLUTE.

See WILL, 16.

BEQUEST, DEFERRED.

See WILL, 12.

BEQUEST, SPECIFIC.

See WILL, 6, 7.

BILL.

See JURISDICTION, 1.

BILL OF PEACE.

See JURISDICTION, 1.

BILL OF COSTS, TAXATION OF, UNDER 6 & 7 VICT. c. 73, s. 37.

See SOLICITOR AND CLIENT, 1.

BONUS.

See STOCK, 2.

BOUNDARIES, CONFUSION OF.

Testatrix by her will appointed the manor of *W.* (over which she had an equitable power of appointment) to uses, under which the plaintiff became entitled as tenant in tail in possession, and devised her

CHARGE OF DEBTS. 757

residuary real estate to trustees upon trust to sell. The trustees sold (*inter alia*) a field, part of which was shown by the abstract to be parcel of the manor, and procured the legal estate in the whole to be conveyed to the purchaser:—*Held*, that, notwithstanding the fault of the confusion lay with the party through whom the Plaintiff claimed, the Plaintiff was not precluded from establishing in this Court a claim to his portion of the land, and to a proportional part of the rents from the time when he came of age. And an inquiry was directed, in what part of the field the Plaintiff's portion was situate. *Hicks v. Hastings*, 701

BOUNDARY, DISCOVERY IN QUESTION OF.

See PRACTICE, 5.

CALLS, VALIDITY OF.

See COMPANY, JOINT STOCK.

CESSER OF EQUITABLE LIFE ESTATE, PROVISO FOR.

See WILL, 17.

CHAMBERS, PRACTICE IN.

See PRACTICE IN CHAMBERS.

CHARGE, ENLARGEMENT OF INDEFINITE.

See WILL, 5.

CHARGE OF DEBTS.

See WILL, 14.

CHARITY.

The circumstance that trustees of a charity to which money is bequeathed *may* consistently with their trust apply the fund in a manner which would be illegal under stat. 9 Geo. 2, c. 36, is not, of itself, sufficient ground for withholding the fund. The question is whether they *must* so apply it.

If the Court sees that the trust can be duly performed without necessarily applying any part of the fund in an illegal manner, it will declare the trustees entitled, but with a further declaration in the case supposed above, to prevent the illegal application. With these declarations the Court will hand over the fund to the trustees.

Bequest to four persons, upon trust, to pay the same to the treasurers of a charitable society. By an earlier deed the object of the society was declared to be to promulgate the Gospel by (inter alia) "opening and supporting Sunday-schools, by the erection or providing of places for religious worship, and by such other means as to the society should seem meet."

Held, that the bequest was good within the stat. 9 Geo. 2, c. 36, inasmuch as the deed recited that lands had been already purchased with the money of the society, and notwithstanding the deed contained a further recital that other lands might thereafter be conveyed for the purposes of the society; for the erections might be on the lands then already held in mortmain. But, having regard to the latter recital, *Declared*, that the application of any part of the fund towards the purchasing of additional land by the charity would be illegal.

The preceding bequest was followed by a codicil, by which, in case

any part or parts of testator's personal estate previously settled or bequeathed by him to charitable uses should by any statute or law then in being be considered not to have their full operation for the intents and purposes for which he had designed them, the testator bequeathed all such monies to *the same four persons* as joint tenants, free from any trust or condition whatever, expressed or implied:—*Held*, that, even if the bequest in the will had been void under the statute, the bequest in the codicil would have been valid; and that notwithstanding the survivor, by his counsel at the bar, professed that, having regard to the contents of the will and codicil, he should feel bound to hand over the fund to the charity.

In such a case it is impossible for the Court to intend any trust, unless it can convert the legatees into trustees, by proof of some communication between them and the testator, importing that he intended a trust, which they, in effect, undertook, and by which, therefore, their consciences would be bound—*semble*.

Lord Northington's decision in the *Attorney-General v. Tyndall* (2 Eden, 207) that a gift over for charitable uses, in the event of a previous gift being void under the statute, must be taken as in fraud of the law, and intended to intimidate the heir or next of kin, and prevent their disputing the charity, and therefore void—*Disapproved*.

Lord Northington's other proposition in the same case, to the effect that the building on land already held in mortmain, inasmuch as it improves the estate, and renders it more valuable, is a transgression of the statute 9 Geo. 2, c. 36, has been overruled by a series of subsequent decisions.

Further observations on that case,

and observations on the *Attorney-General v. Bowles* (3 Atk. 806).

In a deed like the above, the Court would read the trust as a trust to promulgate, &c., by all or any of the means there specified. *Carter v. Green*, 591

See WILL, 21.

CHILDREN, YOUNGER.

See SETTLEMENT, 4.

CHOSE IN ACTION.

Notice of an assignment of a chose in action, although derived aliunde, and not from assignor or assignee, is sufficient to give priority—*semble*. *In re Raubone's Bequest*, 300

See BANKRUPTCY.

CLASS.

See WILL, 3, 4, 10.

CLIENT AND SOLICITOR.

See ADMINISTRATION.

SOLICITOR AND CLIENT, 1.

COMMISSION.

See TRUSTEES, 2.

COMMON LAW PROCEDURE ACT, 1854, SECT. 8.

See ARBITRATION.

JURISDICTION, 3.

COMPANY INCORPORATED BY ACT OF PARLIAMENT.

1. Although it is competent to the directors of every railway company, on complying with the *Wharcliffe* Order, to apply to Parliament for an extended line, or for any

other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the company, and from issuing new shares, purporting to be shares in the company, except for the purposes and under the powers of existing Acts. *Vance v. The East Lancashire Railway Company*, 50

2. Bill by a canal company for specific performance by a railway company of an agreement to purchase the canal for 12,000*l.*, entered into by the projectors of the railway, with a view of obviating *bond fide* opposition on the part of the Plaintiffs to Defendants' Act—*Dismissed*, on the ground that there was no agreement under seal, or signed by two of the directors of the railway company as required by the 97th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) notwithstanding the Plaintiffs had, upon the faith of the agreement, withdrawn their opposition, and had further performed their part of the agreement, by obtaining an Act authorising the sale and purchase of the canal, and notwithstanding other circumstances tending to show part performance, and a *bond fide* intention by both parties to complete.

By the Act authorising the sale and purchase of the canal, the Defendants were "authorised and required," with consent of three-fifths of the proprietors present at a special meeting, "to purchase the canal upon such terms and conditions as shall be or may have been agreed upon between the said companies." The proprietors present at a special meeting, duly held and called in every respect as required by the Act, passed a unanimous resolution (afterwards communicated to the Plaintiffs) authorising the directors to purchase the canal for 12,000*l.*,

upon such terms and conditions as to them should seem meet.

Held, 1st, that the Act, not referring to the previous imperfect agreement, did not give validity thereto. 2nd, that, notwithstanding the meeting had been held, and the requisite consent of the proprietors obtained, the company were not bound by the words "authorised and required to purchase," inasmuch as the purchase was to be subject to such terms and conditions as should be agreed upon "between the said companies." And the proprietors having referred it to their directors to settle such terms and conditions, the latter could only do so in the mode prescribed by the 97th section of the Companies Clauses Consolidation Act, viz. by an agreement signed by two at least of their number.

Besides, where there is not already an agreement under the company's seal, or signed by two of the directors, or where there is any question left open as to the terms or conditions of the agreement, the proper mode of enforcing such a direction in an Act of Parliament is by mandamus, and not by suit for specific performance—*semble*.

Had the Plaintiffs obtained from the directors a conditional agreement, stipulating, that, in the event of an Act being obtained authorising a sale and purchase of the canal, they would bind the company to carry out the imperfect agreement, then, on the passing of such Act, the company might have been completely and effectively bound—*Obiter*.

All that was decided by the House of Lords in *The Caledonian and Dumbartonshire Railway Company v. The Magistrates of St. Helensburgh* (2 Macqueen, 391) is, that what directors cannot do after the incorporation of a company, provisional

directors cannot do before, for the purpose of binding the shareholders.

Observations on the necessity in dealing with public companies of obtaining agreements drawn up and executed in the most legal, solemn, and binding form; experience showing, that, in such transactions, good faith cannot be relied on. *The Company of Proprietors of the Leominster Canal Navigation v. The Shrewsbury and Hereford Railway Company*, 654

3. By a railway company's Act, after reciting that the company had issued certain "preference shares," on the terms of the holders thereof being entitled to "fixed preferential dividends thereon, payable out of the revenues of the company," at certain rates in the Act mentioned, it was enacted, That the income of the company, from time to time applicable to the payment of interest on moneys borrowed and dividends on shares, should be applied, first, in payment of the interest, from time to time accruing, on mortgages and bonds; next, in payment of the preferential dividends on the several classes of preference shares, in the order in the Act specified; and, lastly, in payment rateably of dividends on original shares. The contracts upon which the preference shares had been issued and taken up (irregular in themselves, but rendered valid by the Act) were to the effect that such preference shares should be entitled, some to a dividend at a certain given rate per cent. for a given number of years, and at a lower given rate in perpetuity thereafter; others to a given rate per cent. without restriction as to time; and others at a given rate per cent. for a term certain, and thereafter until such time as they

were redeemed by the company :—*Held*, that, coupling the enacting part of the Act with the recitals in its preamble, and having regard to the contracts upon which the shares were issued, the holders of such preference shares were entitled, according to their priorities *inter se*, to arrears of former dividends before any dividend could be paid to the holders of ordinary shares; for the word “dividend” is not, *ex vi termini*, restricted to profits accruing during any given period; and here, the consequences of so restricting it would be to enable the holders of ordinary shares so to arrange the declaration of their dividends as to prevent the holders of preference shares from deriving any of the advantages for which they had stipulated. *Crawford v. The North Eastern Railway Company*, 723

COMPANY, JOINT STOCK.

The 25th section of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), enabling a shareholder, whose name is without sufficient cause omitted to be entered in the company's register, to apply by motion for an order that the register may be rectified, was not meant to give to every shareholder *ex debito justitiæ* this summary remedy. The object of that section was, to enable the Court to avoid the inconvenience and injustice which occasionally arise from capricious or frivolous objections on the part of companies to complete the registration of their shareholders. It was not intended by the Act, that, in the event of there being a serious question to be tried, the matter should be disposed of summarily.

A resolution for a call may be good, though resolutions for calls for

smaller sums had been previously negatived at the same meeting.

Whether, provided shareholders have had notice by means of circulars of a meeting for the purpose of making calls, a shareholder, who has attended such meeting, can object to calls made thereat, on the mere ground that the company omitted to advertise the meeting in any newspaper, as required by their deed of settlement—*quære*.

But where a shareholder, having so attended at such meeting, had allowed others to pay their calls, and after lying by for six months, had assigned his shares :—*Held*, that his assignees could not, by motion under the 25th section of the Act, apply to have his name entered on the register, so long as the calls remained unpaid; and his motion was dismissed with costs. *In the Matter of The British Sugar Refining Company, and In the Matter of The Joint Stock Companies Act, 1856*, 408

COMPANY, JOINT STOCK,
CONTRACT TO FORM.

See CONTRACT, 1.

COMPROMISE.

See STATUTE OF LIMITATIONS, 1.

“CONCEALED FRAUD.”

See STATUTE OF LIMITATIONS, 1.

CONDITION, PRECEDENT.

See WILL, 13.

CONFUSION OF BOUNDARIES.

See BOUNDARIES.

“CONSENT OF TRUE
OWNER.”

See BANKRUPTCY.

CONSTRUCTION.

See DEED.

* SETTLEMENT, 2, 4.

STATUTE, SPECIAL, CONSTRUCTION OF, 1.

WILL, 1, 3, 4, 5, 9, 12, 16, 19, 20, 22, 23.

CONTINGENT REMAINDERS.

See DEED.

CONTRACT.

1. The Plaintiff, being the owner of certain patents, entered into a written agreement with other persons to form a joint stock company for the purpose of working these patents, he agreeing on his part to sell the patents to the company upon certain terms, and to take all requisite measures for obtaining patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company:—*Held*, that the Plaintiff could not obtain specific performance of this agreement against his co-promoters, because, from the nature of his own part of the agreement, the Court could not compel specific performance of it by him.

The difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in equity, is, that the Court could, at any time, upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction; but if in such a case as this the Court were to compel the Defendants to become a registered company, that could not afterwards be undone, if the Plaintiff were to

fail in his part of the agreement.
Stocker v. Wedderburn, 393

2. A railway company granted to two lessees the sole and exclusive license and privilege, for ten years, of selling books and other publications at such of the company's stations as the lessees should think fit, and of using the book-stalls thereat respectively; covenanted that all books, &c., sent by the lessees to be sold pursuant to such licence, should be conveyed by the company's trains to any such station without any charge; and warranted quiet and peaceable enjoyment.

Held—1st, as to stations where book-stalls were in existence at the date of the grant, that the company must be taken to have granted the user of those specific stalls; and if not, still it was incumbent on the company to show that stalls to which they attempted to remove the lessees would be equally convenient. 2nd, as to other stations, that, if the lessees could be entitled in any case to erect stalls thereat, this Court would not make a declaration to that effect, because this Court could not judge whether sales from stalls or by colportage should be adopted; and also because such a declaration would lead to continual applications with reference to the gradual increase in size of the stalls. 3rd, that the privilege of selling books, &c., authorised a bonâ fide sale to passengers, and such other persons as ordinarily attended at the company's stations on business connected with the railway, and not a general agency; consequently, that the lessees were not entitled to free carriage except in respect of books to be so sold.

And on bill filed by the lessees, an injunction was granted, restraining the company from evicting

Plaintiffs from book-stalls existing at the date of the agreement, notwithstanding Plaintiffs failed in their contention as to the second and third points, and notwithstanding misconduct on the Plaintiffs' part in not strictly and honourably performing their part of the agreement; the Court being of opinion that it would be impossible, under the circumstances, to estimate the damages to which Plaintiffs would be exposed if an injunction were not granted.

This Court will not direct an account as to a part of an agreement where it cannot decree specific performance of the whole: nor will this Court make any declaration of right upon a contract except as to so much of it as has been, or is about to be, broken. *Holmes v. The Eastern Counties Railway Company*, 675

See COMPANY INCORPORATED BY ACT OF PARLIAMENT, 5.

CONVERSION.

See STAT. 13 & 14 VICT. c. 60.

COPYHOLDS.

When copyholds are surrendered by attorney, and the attorney exceeds his power, the admittance is cut down to the limits of the surrender authorised by the power. *Carter v. Carter*, 617

COPYRIGHT.

1. An agreement between an author and a publisher, that the latter should publish a certain work at his own expense and risk, and after deducting from the produce of the sale thereof the charges for print-

ing, paper, advertisements, embellishments, and other incidental expenses, including the allowance of 10% per cent. on the gross amount of the sale for commission—the profits remaining of any edition that should be printed, should be divided equally between author and publisher. The books sold to be accounted for at the trade sale price, unless it should be thought advisable to dispose of any copies or of the remainder at a lower price, which was left to the publisher's discretion:—*Held*, that this did not amount to an agreement for the sale of the copyright; that it was to be inferred from the agreement that the publisher was to fix the selling price of the book, and that he was to be at liberty to publish more than one edition.

Whether the agreement created a partnership pro hac vice between the author and publisher — *quære*. *Reade v. Bentley*, 271

2. The 23rd section of the Copyright Act (5 & 6 Vict. c. 45) does not give to the registered proprietor of a copyright in any book a right in this Court to more than the usual account of the net profits of all copies of the book. He has no right in this Court to an account of the gross proceeds.

To recover the pirated copies, he must proceed at law. *Delfe v. Delamotte*, 581

3. If any person by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former

general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is sufficient to constitute an original work, of which the copyright will be protected.

But another person may originate another work in the same general form, provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it.

The question in determining whether an injunction should be ordered where the matter of the Plaintiffs' work is not original, is, how far an unfair or undue use has been made of the work.

Instances of unfair or undue use, and the contrary, in works of this description.

If, instead of searching into the common sources and obtaining your subject-matter from thence, you avail yourself of the labour of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use.

Falsely to deny that you have copied or taken any idea or language from another work, strong indication of *animus furandi*.

Notwithstanding *Bell v. Whitehead* (13 Jur. 68), if the Court is led to the conclusion that there has been piracy, it will not grudge any labour that may be requisite in order to ascertain how far the injunction should extend.

Form of injunction where certain distinct parts of a work like the above are unobjectionable and others contain piracies. *Jarrold v. Houls-*
ton,

708

COUNSEL.

COSTS.

1. Costs occasioned by a notice of motion which was rendered ineffective by a subsequent amendment of the Bill, must be paid by the Plaintiff. *The London and Blackwall Railway Company v. The Board of Works for the Limehouse District*,
123

2. The higher scale of costs mentioned in the Orders of January 30, 1857, applies to all cases except those specified in such Orders as subjects of the lower scale. *Reade v. Bentley*,
271

3. In a suit for partition, costs of infants, including as well the costs incurred before the issuing of the commission, as those incurred subsequently thereto, charged upon and ordered to be raised out of the shares allotted to such infants respectively in severalty. *Cox v. Cox*,
554

4. Trustees who have paid trust funds into court under the Trustee Relief Act, and take copies of affidavits of parties claiming to be beneficially interested in the fund, will not be allowed their costs of the copies of affidavits so taken by them. *In re Lazarus*,
555

5. In charity cases, where no improper point is raised on behalf of their next of kin, the latter are entitled to their costs as between solicitor and client. *Carter v. Green*,
591

See ADMINISTRATION.

DEMURRER.

SHIPPING, 2.

TRUSTEES, 1, 5.

COUNSEL.

See PRACTICE IN CHAMBERS.

CREDITORS.

COVENANT.

See SETTLEMENT, 3.

CREDITORS.

Since the passing of the 1 & 2 Vict. c. 110, an investment of money in the purchase of stock in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property besides the money so invested to pay the debts he then owed, is void under 13 Eliz. c. 5; because, by the 1 & 2 Vict. c. 110, money or stock may be taken in execution, and therefore the effect of such a settlement would now be to delay, hinder, or defraud the creditors of the settlor.

For the same reason, any purchase of property by a settlor so indebted, in the name of a child or other person, would now be void under the statute of Elizabeth.

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name, belongs to her husband.

Secus as to moneys saved by her out of the income of her separate estate, and so invested.

Where such investment had been made by her husband for her, upon its being impeached by his creditors after his death,—*held*, that the onus was upon her to prove that the moneys were the savings of her separate estate.

She proved that they were saved out of rents of furnished houses, which were settled to her separate use:—*Held*, that threw back upon the creditors the onus of proving that the furniture belonged to the husband, and, also, what part of the

DECREE FOR SALE. 765

rents were to be attributed to the furniture. *Barrack v. M'Culloch*, 110

See ADMINISTRATION.

SETTLEMENT, FRAUDULENT, 1.

CREDITORS, EQUITY OF, TO HAVE A FUND SECURED.

See WILL, 18.

CREDITORS' SUIT.

See ADMINISTRATION.

CROSS-EXAMINATION.

See PRACTICE, 1.

CROWN, RIGHTS OF THE.

See FOREST OF DEAN.

DAMNOSA HÆREDITAS.

See WILL, 6.

DEBTS, CHARGE OF.

See WILL, 14.

DEBTS, SATISFACTION OF.

See WILL, 15.

DEBTS, SPECIALTY.

See SETTLEMENT, 3.

DECLARATION OF RIGHT.

See CONTRACT, 2.

DECREE FOR SALE.

See WILL, 6.

DEED.

Limitation in a deed to trustees "and their heirs," (without words restricting it to the lives of preceding tenants for life), upon trust to preserve contingent remainders:—*Held*, that, although the omission of such words was probably an oversight, yet, the instrument being a deed, the Court could not construe the limitation as restricted, notwithstanding an estate in fee was a larger estate than was required for the purposes of the trust, and the limitation was repeated in a subsequent part of the deed, and was followed by a term of years in a third party, upon trust to raise portions, and by a power for the tenants for life to grant leases.

To justify the Court in restricting such a limitation by deed to an estate *pur autre vie*, it must be shown that the intention of the parties, as manifested by the deed, cannot be carried into effect, unless the limitation be so restricted.

Distinction in this respect between deeds and wills. In the latter, a greater latitude is allowed in the construction of legal terms, the testator being supposed *inops consilii*.
Lewis v. Rees, 182

DEED, CONSTRUCTION OF.

See CHARITY.

DEEDS, POSSESSION OF TITLE.

See ADMINISTRATION.
MORTGAGE, 2.

DEFERRED BEQUEST.

See WILL, 12.

DEMURRER.

The 20s. paid by the Plaintiff to a Defendant who has demurred, on obtaining leave to amend before the demurrer has been set down for argument, covers all the costs of preparing and filing such demurrer. But the costs of preparing a demurrer which was prepared but not filed before amendment, are costs of suit. *Bainbrigg v. Moss*, 62

DEVISE.

See WILL, 3, 5, 24.

DEVISE OF TRUST ESTATES BY SURVIVING TRUSTEE.

See TRUSTEES, 6.

DISCHARGE, RIGHT OF TRUSTEES TO.

See TRUSTEES, 5.

DISCOVERY.

See JURISDICTION, 3.

PLEADING, 1.

PRACTICE, 5.

PRODUCTION OF DOCUMENTS, 2.

DISCRETION.

See WILL, 18, 19, 21.

DISMISSING A BILL.

See PRACTICE, 4.

DISTRIBUTION.

See WILL, 4.

DISTRIBUTION BY MISTAKE.

See ADMINISTRATION.

DIVIDENDS.

DIVIDENDS.

See COMPANY INCORPORATED BY
ACT OF PARLIAMENT, 3.

DOWER.

See WILL, 11.

EJECTMENT.

See PRODUCTION OF DOCUMENTS, 1.

ELECTION.

See WILL, 6, 11.

ENCROACHMENT.

See FOREST OF DEAN.

ENLARGING TIME.

See PRACTICE, 1.

ESTATE IN FEE.

See DEED.

ESTATE PUR AUTRE VIE.

See DEED.

ESTOPPEL.

See LANDLORD AND TENANT, 1.
MORTGAGE, 1.

EVIDENCE.

See ARBITRATION.
JURISDICTION, 1.

EVIDENCE, PAROL.

See QUALIFICATION, 1.
WILL, 23.

FOREST OF DEAN. 767

EXCEPTIONS TO ANSWER.

See PLEADING, 1.

EXECUTORS.

See TRUSTEES, 3.

EXECUTORS, ASSENT OF.

See WILL, 6.

**FEE SIMPLE, WHAT WORDS
SUFFICIENT TO PASS.**

See WILL, 22.

**FICTITIOUS NAME, TRANS-
FER OF STOCK INTO.**

See STOCK, 1.

FOREIGNER.

See TRADE MARK, 1.

FOREST OF DEAN.

The Act 1 & 2 Vict. c. 42, for confirming the titles to and granting leases of encroachments in the *Forest of Dean*, was not intended to affect equities to which the property might be subject in the hands of those who, at the passing of the Act, were the holders of such encroachments, or the rights of parties claiming in remainder expectant upon the determination of their estates.

Therefore, where it appeared that a party, who was holder and in possession of an encroachment at the passing of the Act, and, as such, had obtained a conveyance in fee under the 8th section, was so in possession under a devise to her for her life only, with remainders over:—*Held*, that she had acquired the fee

not only for her own benefit, but also for the benefit of those in remainder; and that the latter were entitled to call upon her devisees for a conveyance of the fee.

The 12th section of the Act explained. It was intended to provide for disputes between parties claiming adversely the legal right (speaking without regard to the Crown's title) to be in possession and treated as holders. It has no reference to the case of parties claiming as equitably interested, or as entitled in remainder. *Yem v. Edwards*, 564

FORFEITURE, PROVISIO FOR, ON ATTEMPTED ALIENATION OR BANKRUPTCY.

See MORTGAGE, 1.
WILL, 17.

"FOUNDATION," EFFECT OF THE TERM, IN REFERENCE TO THE LAW OF MORT- MAIN.

See WILL, 21.

FRAUD.

Four out of five persons, who entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a company, were deceived by the fifth, who, assuring them that the vendors would not take less than 85,714*l.*, obtained secretly from the latter an agreement, that, if the contract were perfected, and the money paid, he should receive thereout a bonus of 20,000*l.* for his pains in effecting the sale.

Two of the four, having absolute powers from the rest to sell to the intended company, then formed themselves with others into a committee of management, and, still ignorant

of the surreptitious agreement, issued a prospectus, stating that a contract had been entered into for the purchase by the company of the entire property for 125,000*l.*, "including all preliminary expenses, and a premium to the parties who incurred the risk and responsibility of the original purchase." The company having been established, the requisite capital paid up, and the provisional contract perfected: — *Held*, that the 20,000*l.* transaction was fraudulent, and void not only as against the four original purchasers, but also as against the company, notwithstanding the mine proved cheap at the price (125,000*l.*) at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly and rightly, to give them. *Beck v. Kantorowicz*; *Kantorowicz v. Carter*; *Kalb v. Kantorowicz*, 230

See SETTLEMENT, VOLUNTARY, 1.
SOLICITOR AND CLIENT, 1.
TRADE MARK, 1.

FRAUD CONCEALED.

See STATUTE OF LIMITATIONS, 1.

FRAUD ON THE LAW.

See QUALIFICATION, 1.

FUND IN COURT.

See ADMINISTRATION.

FURTHER CONSIDERATION.

See PRACTICE, 4.

GIFT OVER, CONTRADICTORY.

See WILL, 22.

GIFT OVER, IN EVENT OF INTESTACY.

See WILL, 20.

HEIR.

See PRODUCTION OF DOCUMENTS, 1, 2.

HUSBAND AND WIFE.

1. Any agreement made before or after marriage, which contemplates a voluntary separation of husband and wife, is void as contrary to the policy of the law.

By an ante-nuptial settlement, property of the husband was limited during the joint lives of himself and the wife, "if she should so long continue to live with him, and should not live separate and apart from him through any fault of her own," in trust for the separate use of the wife, without power of anticipation; and after the decease of either, "or in the event of the wife living separate and apart from her husband through any such fault," for the survivor, or for the husband, as the case might be; and after the death of the survivor, "or in the event of the wife living separate and apart from her husband through any such fault as aforesaid," for the children of the marriage:—*Held*, that the limitations over upon the separation of the wife and husband were void as contrary to the policy of the law; for such a limitation in favour of the husband, if valid, would be a direct inducement to permit a state of separation, capriciously commenced by

the wife, to continue. *H. v. W.*, 382

2. Settlement, in contemplation of marriage, of an annuity secured by bond to *N.* (the intended wife), together with arrears then due, upon trust for her separate use; the receipts of *N.*, her appointees or assigns, to be good discharges for the annuity and all arrears, and all future and growing payments; and after her decease upon trust to pay all and singular the said trust moneys, or such of them as should be unpaid or undisposed of at the time of her decease, (in the events which happened) to her children (nominatim), with provisions for their maintenance, education, and advancement.

Subsequently, the annuity being in arrear to an amount exceeding 3000*l.*, *N.* and her trustee released the annuity and all arrears and future payments, and in consideration of such release the obligor conveyed certain hereditaments to trustees upon trust to sell, and out of the proceeds to pay 3000*l.* to *N.*, her executors or administrators, and the surplus to himself, *N.* being a party to such conveyance.

Held, that upon *N.*'s death the 3000*l.* passed to her husband, and was not impressed with any trust for the benefit of her children. *Calvert v. Johnston*, 556

See CREDITORS.

SETTLEMENT, 2.

SETTLEMENT, FRAUDULENT, 1.

INCAPACITY, MENTAL.

See STATUTE OF LIMITATIONS, 1.

INCONSISTENCY.

See STATUTES, SPECIAL, CONSTRUCTION OF.

INCUMBRANCE, PRIORITY OF.

See MORTGAGE, 1.

INFANT.

Money belonging absolutely to a young lady under age, having been paid into Court under the Trustee Relief Act, and an order made upon petition under that Act for payment of part of the dividends to her testamentary guardian for her maintenance, in pursuance of an order for an allowance for her maintenance made upon an application at Chambers:—*Held*, that the infant was thereby made a ward of Court. *In the Matter of The Trustee Relief Act; In the Matter of the Trusts of Hodge's Settlement; In the Matter of The Trusts of Coggan's Will; In the Matter of M. C. L. Hodges, an Infant; In the Matter of the 18 & 19 Vict. c. 43, The Infants Settlements Act*, 213

INFANTS, COSTS OF, IN SUIT FOR PARTITION.

See COSTS, 3.

INJUNCTION.

See COMPANY INCORPORATED BY ACT OF PARLIAMENT, 1.

CONTRACT, 1.

COPYRIGHT, 3.

MINES AND MINERALS, 1.

SHIPPING, 2.

TRADE MARK, 1.

INQUIRY.

See TRUSTEES, 3.

INTESTACY, GIFT OVER IN EVENT OF.

See WILL, 20.

ISSUE DEVISAVIT VEL NON.

See JURISDICTION, 1.

JOINT STOCK COMPANY.

See COMPANY, JOINT STOCK.

JOINT STOCK COMPANY, CONTRACT TO FORM.

See CONTRACT, 1.

JURISDICTION.

1. This Court can entertain a suit to establish a will against parties claiming under a prior will, and disputing the Plaintiff's claim: a devisee being entitled to have the will established and his title quieted not only against the heir, but against all persons setting up adverse rights.

But whether the Court can establish a will against a devisee claiming under another instrument, without directing an issue, (except where an issue would be merely frivolous and vexatious)—*quære*.

Observations on the impropriety, in such cases, of detailed evidence on the part of the defence. *Lovett v. Lovett*, 1

2. This Court has jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital; and it is not necessary to show that the concern is embarrassed.

Dissolution of a partnership decreed on that ground in a case involving other and special circumstances, on which, however, the Court did not rely as essential to the decree. *Jennings v. Baddeley*, 78

3. Courts of Equity have juris-

diction to entertain a Bill for discovery merely, in aid of a compulsory reference to arbitration, ordered under the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). And this jurisdiction is not affected by the powers given by the 7th section of the Act, of compelling discovery independently of the assistance of Courts of Equity.

To such an arbitration, Lord *Eldon's* dictum, in *Street v. Rigby* (6 Ves. 821), as to the reluctance of Courts of Equity to be auxiliary to domestic forums, has no application.

Demurrer to a Bill of this description overruled with costs. *The British Empire Shipping Company (Limited) v. Simes*, 433

LACHES.

See BANKRUPTCY.

SOLICITOR AND CLIENT.

VENDOR AND PURCHASER, 2.

LANDLORD AND TENANT.

The doctrine of estoppel between landlord and tenant is founded upon the principle, that a lessee, having accepted a lease, may not plead to the action of his lessor *nil habuit in tenementis*.

But the lessee may plead to such an action, that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose.

Therefore, if a termor affect to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the person to whom he made such assignment; and, accordingly, it would be doubtful whether the assignor would have

any remedies for recovering the rent. The statute 4 Geo. 4, c. 28, does not give power to distrain for such a rent. *Langford v. Selmes*, 220

See MINES AND MINERALS.

LANDS CLAUSES CONSOLIDATION ACT.

A railway company takes possession of land under a contract for a sixty years' title. The vendor fails to show more than a possessory title for thirty-six years:—*Held*, that he cannot compel the company to deposit the purchase money in the Bank under the 76th section of the Lands Clauses Consolidation Act, 1845.

By the term "owner" in that section, the Legislature meant a person having *some* title; and in providing for the event of an owner "failing to make out a title to the satisfaction of the promoters of the undertaking," they had in contemplation the possibility of the land being subject to dower or jointure, or some other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title.

A surviving partner, selling partnership lands in discharge of his duty, as survivor, to wind up the partnership, is an owner within the meaning of the 76th section; and, by virtue of that and the 77th section, the promoters of the undertaking, depositing the purchase money in the Bank to the credit of the vendor and of the representative of his deceased partner, would acquire all the estate and interest of both.

A person in possession, but showing a bad title, is not the "owner" within the meaning of the 76th section; and where the lands are in such possession, and the true owner

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cannot be found, the promoters must have recourse to the jury clauses of the Act—*obiter*. *Douglass v. The London and North Western Railway Company*, 173

LANDS CLAUSES CONSOLIDATION ACT, SECT. 79.

See PRACTICE, 3.

LAW, FRAUD ON THE.

See QUALIFICATION.

LAW, POLICY OF THE.

See HUSBAND AND WIFE, 1.

LEASES.

See LANDLORD AND TENANT.

"LEAVING" CONSTRUED AS "HAVING."

See WILL, 22.

LEGACIES, CHARGE OF, ON REAL ESTATE.

See WILL, 8.

LEGACY, REVERSIONARY INTEREST OF BANKRUPT IN A.

See BANKRUPTCY.

LEGAL ESTATE, PROTECTION AFFORDED BY.

See MORTGAGE, 1.

LIFE ESTATE, EQUITABLE.

See WILL, 17.

MINES AND MINERALS.

MAINTENANCE.

See WILL, 19.

MANAGING OWNER.

See SHIPPING, 1.

MANDAMUS.

See COMPANY INCORPORATED BY ACT OF PARLIAMENT, 2.

MARSHALLING OF ASSETS.

See WILL, 14.

MEETINGS OF PUBLIC COMPANIES.

See COMPANY, JOINT-STOCK, 1.

MENTAL INCAPACITY.

See STATUTE OF LIMITATIONS, 1.

MERCHANT SHIPPING ACT, 1854.

See SHIPPING, 2.

MINES AND MINERALS.

There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise.

Inquiry directed upon this principle, with a view to an injunction.
Dugdale v. Robertson, 695

MISJOINDER.

See PLEADING, 2.

MISTAKE, DISTRIBUTION OF FUND IN COURT BY.

See ADMINISTRATION.

MONEY PAID INTO COURT.

See ADMINISTRATION.

MORTGAGE.

1. Review of the principal authorities on the protection afforded by this Court to a purchaser for valuable consideration without notice of a prior incumbrance, where he has got in the legal estate or obtained possession of the title deeds.

Semble, the earlier authorities on this subject have gone to a greater length than would be supported by more modern decisions.

The authorities establish that a purchaser from a person in possession, purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from a trustee of a satisfied term, or a mortgagee whose mortgage is satisfied, will be protected in this Court against a prior incumbrancer or cestui que trust, provided the party so conveying the legal estate have no notice of the prior trust or incumbrance.

But it has never yet been decided, that, where the party so conveying has notice of an express prior trust or incumbrance, the purchaser can protect himself therefrom by means of the legal estate.

And, *semble*, such a decision would be contrary to the principles of this Court.

J. C., believing himself and three others to be entitled under a will to four-eighths of certain freehold and copyhold estates, joined them in a mortgage of all his estate in the four-eighths to *P.* Subsequently, it was discovered that the supposed last will had been revoked by a later will, by which all the estates were devised to *J. C.* for life, but subject to several annuities, with remainders over.

Held, that the mortgage to *P.* passed *J. C.*'s life interest in the entire four-eighths, and was the first incumbrance on one-eighth of the copyholds to which *P.* had been admitted. But,

Held, further, that although *P.* had acquired the legal estate in this one-eighth for valuable consideration, as it were, by accident, and without notice that the former will had been revoked, so that his conscience was not affected by any of the trusts to which, by the subsequent will, the estate was subjected, he must hold subject to those trusts, since the will by which they were created was the very instrument upon which his title to the legal estate depended. And,

Semble, the absence of fraud on the part of the mortgagor did not affect the question.

Estoppel.—Estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action or proceeding there can be no estoppel.

Therefore, although the mortgage to *P.* recited that the first will was the last will, and was not revoked, and that under the first will three other persons, parties to the deed, were entitled to three-eighths, which

they mortgaged to *P.* thereby, this did not prevent a prior mortgagee from showing, in a suit for administration of testator's estate, that the recital was untrue, and that by the real last will the three-eighths in question were vested in *J. C.* for life.

Forfeiture.—Three other persons named in the first will as tenants in common, believing themselves entitled under that will each to one-eighth, executed mortgages of their supposed shares and all their estates and interests in the testator's estates. They had, in fact, under the subsequent will annuities merely, charged on the testator's estates, and given to them for life, or until they should do any act which but for that condition would have the effect of alienation. —*Held*, that the annuities ceased from the dates of such mortgages respectively, notwithstanding the annuitants were then in ignorance of the existence of the will restraining alienation.

But, *semble*, had such mortgages been of all their shares under the first will, and all their estates and interests in the premises thereby mortgaged—*secus*.

Observations on *Faussett v. Carpenter* (2 Dow & Cl. 232). *Carter v. Carter*, 617

2. *Possession of Title Deeds.*—In order to postpone any party to a cause in respect of a prior mortgage or incumbrance on the ground that you have got the title deeds, it must be shown that you have got them through gross negligence on the part of the person you seek to postpone; and the onus is on you of showing this.

Instances of gross negligence and the contrary:—To allow title deeds to remain with a party, who, besides having a beneficial interest in the property, is also a trustee for others,

NOTICE.

not gross negligence; for, *quod* trustee, he is the right person to hold them.

To allow them to remain with one of several tenants in common after he has mortgaged his share, not gross negligence—*semble*. *Ibid.*

MORTGAGEE.

See ADMINISTRATION.

STAT. 13 & 14 VICT. c. 60.

MORTMAIN.

See CHARITY.

WILL, 21.

MOTION FOR DECREE.

See PRACTICE, 1.

MOTIONS AT MEETINGS OF PUBLIC COMPANIES.

See COMPANY, JOINT STOCK, 1.

NEGATIVE TERM IN A CONTRACT.

See CONTRACT, 1.

NEPHEWS AND NIECES.

See WILL, 10.

NOTICE.

See BANKRUPTCY.

CHOSE IN ACTION.

NOTICE, PURCHASER WITHOUT.

See MORTGAGE, 1.

ONUS OF PROOF.

ONUS OF PROOF.

See CREDITORS.

ORDER AND DISPOSITION.

See BANKRUPTCY.

ORDERS OF 1828.

See DEMURRER.

**OVERCHARGES, GROSS, IN
A SOLICITOR'S BILL OF
COSTS.**

See SOLICITOR AND CLIENT.

**PARLIAMENT, APPLICATION
TO.**

*See COMPANY INCORPORATED BY ACT
OF PARLIAMENT, 1.*

**PARLIAMENTARY BUSINESS,
TAXATION OF SOLICITOR'S
BILL OF COSTS FOR.**

See SOLICITOR AND CLIENT.

PAROL EVIDENCE.

*See QUALIFICATION.
WILL, 23.*

PARTIES.

See SETTLEMENT, FRAUDULENT.

**PARTITION SUIT, COSTS IN,
PREVIOUS TO COMMISSION.**

See COSTS, 3.

PARTNERSHIP.

*See COPYRIGHT, 1.
JURISDICTION, 2.*

PLEA.

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PATENT SUITS.

See PLEADING, 1.

**PAYMENT INTO COURT UN-
DER TRUSTEE RELIEF
ACT.**

See TRUSTEES, 5.

PEDIGREE.

See PRODUCTION OF DOCUMENTS, 2.

**PER CAPITA, OR PER
STIRPES.**

See WILL, 1.

PERPETUITY.

*See SETTLEMENT, 1,
WILL, 2.*

**PERSONAL ESTATE, LIMITA-
TION OF, BY REFERENCE
TO THAT OF REAL ES-
TATE.**

See SETTLEMENT, 1.

PERSONALTY.

See SETTLEMENT, 2.

**PETITION, SERVICE OF, ON
INCUMBRANCERS, UNDER
8 VICT. c. 18, s. 79.**

See PRACTICE, 3.

PIRACY.

See COPYRIGHT, 3.

PLEA.

See PLEADING, 1.

PLEADING.

1. When Plaintiff's right to relief at the hearing is clear assuming the title stated by his bill, Defendant, by his answer denying that title, is, in certain cases, protected from discovery.

Thus, in a suit to restrain an alleged infringement of a patent, the Defendant, by his answer denying the fact of infringement, is protected from making any discovery immaterial to that question, and which when that question is decided would be given under the decree.

And it is not necessary to set up a defence of this nature by plea. *De la Rue v. Dickinson*, 388

2. Bill dismissed for misjoinder, and because, though one Plaintiff had an interest to maintain the suit, the other had not, and the interest of the former was not that claimed by the bill. *Barton v. Barton*, 512

See QUALIFICATION.
TRUSTEES, 3.

POLICY OF THE LAW.

See HUSBAND AND WIFE, 1.

POWER.

See SETTLEMENT, 1.
WILL, 16, 18.

PRACTICE.

1. The 15 & 16 Vict. c. 86, and the Orders made in pursuance thereof, do not so far change the practice of taking evidence in equity as to make it essential that a Defendant should

know all the Plaintiff's evidence before he adduces his own.

Therefore, the Court will not, on a motion for decree, enlarge the time for the Defendant to file his affidavits, simply to enable him to cross-examine the Plaintiff's witnesses before doing so.

But it would probably grant this indulgence if the Defendant could not afford the expense of a special examiner, and if his application for an enlargement of time were made without delay. *The Marchioness of Londonderry v. Bramwell*, 162

2. A Defendant having several times obtained an extension of time to answer—once upon an affidavit that the answer would be ready in a few days—filed at last a document answering only one immaterial interrogatory, hoping to gain time by driving the Plaintiff to file exceptions for insufficiency. On motion by the Plaintiff, this document was ordered to be taken off the file, and the Defendant was made to pay the costs of the motion, and all other costs occasioned to the Plaintiff by filing such an answer. *Read v. Barton*, 166

3. Upon a petition for payment to the petitioner of the income of a fund arising from the sale of land to a railway company, the petitioner being in possession at the time of the sale as tenant for life, subject to mortgages created by himself, the Court will make an order, without requiring the mortgagees to be served with the petition.

But, *semble*, such service could not have been dispensed with, in case the tenant for life had been out of possession at the date of the sale. *In re Hungerford's Trust*, 455

4. After a decree merely directing accounts and inquiries, a bill may be

dismissed on further consideration.
Barton v. Barton, 512

5. Where the issue is, whether a piece of land called O is or is not identical with or part of land called F, the Plaintiff averring the negative is entitled to production of whatever documents may aid him in establishing his negative averment, notwithstanding such documents may also evidence the Defendant's title.

Therefore, in a case of this description, the Defendant was ordered to produce all maps, plans, and terriers, and all deeds and other documents relating to the matters at issue, but with liberty to seal up such parts of the deeds and other documents as did not describe or relate to parcels.
Earp v. Lloyd, 549

See PRODUCTION OF DOCUMENTS, 1, 2.
TRUSTEES, 3.

PRACTICE IN CHAMBERS.

The practice on proceedings in Chambers is, that, if one side only desires to be heard by counsel, the judge hears the argument in Chambers—if both desire to be so represented, the matter is adjourned to be heard in Court. *Rumbold v. Forteath*, 44

PRE-EMPTION.

See VENDOR AND PURCHASER, 2.

PREFERENCE SHARES.

See COMPANY INCORPORATED BY ACT OF PARLIAMENT, 3.

PRINCIPAL AND AGENT.

See FRAUD.

PRINCIPAL AND SURETY.

A creditor upon giving time to his principal debtor may reserve his rights against the surety, and this without communicating the arrangement to the surety.

But when the creditor gives a release to the debtor he cannot reserve any right against the surety, because the debt is gone at law.

An agreement between a bond debtor and his creditor, that the latter shall take all the debtor's property, and shall pay his other creditors five shillings in the pound, though not a discharge of the bond at law by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; and it is not possible in equity, upon such a transaction as that, to reserve any rights against the surety; and any attempt to do so would be void as being inconsistent with the agreement. *Webb v. Hewitt*, 438

PRIORITY OF INCUMBRANCE.

See MORTGAGE, 1.

PROCEEDINGS IN REM.

See SHIPPING, 2.

PRODUCTION OF DOCUMENTS.

1. In a suit by the heir at law for discovery in aid of an action of ejectment brought by him against persons in possession, claiming as devisees of the ancestor:—*Held*, that the Defendants, whether bound to produce any documents or not, must make the usual affidavit in answer to a summons for production by the Plaintiff. *Rumbold v. Forteath*, 44

2. The right of the heir at law, and that of the heir in tail, to production of documents upon bill for discovery in aid of an action of ejectment, distinguished.

The principle upon which, in such a suit, the heir in tail is entitled to inspect deeds of settlement creating estates tail, has no application to a suit by the heir at law.

But in a suit of this nature the heir at law is entitled to production of all such parts of deeds and writings admitted by Defendants as relate to or tend to show his pedigree.

Form of an order for this purpose.
S. C. (No. 2), 748

See PRACTICE, 5.

PROPERTY QUALIFICATION.

See QUALIFICATION.

PUBLISHER AND AUTHOR.

See COPYRIGHT, 1.

PURCHASER FOR VALUE WITHOUT NOTICE.

See MORTGAGE, 1.

PURCHASER PAYING MONEY INTO COURT.

See ADMINISTRATION.

PURPRESTURE.

See FOREST OF DEAN.

QUALIFICATION.

The statutes relating to the *Bedford Level* require, that a person to be eligible as governor or bailiff

REFUND, LIABILITY TO.

should have at least 400 acres of land within the *Level*:—*Held*, that this must mean, he must have the *beneficial* interest in so much land, because the governors and bailiffs have large powers and public duties, which it could not be intended that a pauper might exercise.

A father conveyed, by a registered deed, 900 acres of land in the *Bedford Level* to his son, in order to make him eligible as a bailiff. The son died shortly afterwards, without being aware of the conveyance, and without having been elected a bailiff:—*Held*, that the father could not recall the gift, but that the heir of the son was entitled to it for his own benefit.

The deed itself not disclosing the motive for the gift, but being simply a conveyance to the son in consideration of affection and a nominal money payment:—*Held*, that a plea of the Statute of Frauds would prevent the admission of parol evidence to raise a resulting trust. *Childers v. Childers*, 810

RAILWAY COMPANY.

See COMPANY INCORPORATED BY ACT OF PARLIAMENT, 1.
LANDS CLAUSES CONSOLIDATION ACT, 1.
PRACTICE, 3.

RAILWAY SHARES.

See PREFERENCE SHARES.
STOCK, 1.

REAL ESTATE.

See SETTLEMENT, 1.

REFUND, LIABILITY TO.

See ADMINISTRATION.

"RELATIVES."

"RELATIVES," WHO TAKE AS.

See WILL, 21.

RELEASE, RIGHT OF TRUSTEES TO.

See TRUSTEES, 5.

REMAINDERS, CONTINGENT.

See DEED.

RENT.

*See APPORTIONMENT.
TRUSTEES, 2.*

RENT, REMEDIES FOR RECOVERING.

See LANDLORD AND TENANT.

REPLICATION.

See ANSWER, 1.

REPUGNANCY, GIFT OVER VOID FOR.

See WILL, 20.

RESIDUARY DEVISE.

See WILL, 8.

RESOLUTIONS AT MEETINGS OF PUBLIC COMPANIES.

See COMPANY, JOINT STOCK, 1.

RESTRAINT ON ALIENATION.

See WILL, 17.

RESULTING TRUST.

See QUALIFICATION.

SETTLEMENT. 779

REVERSIONARY INTEREST.

See STOCK, 2.

REVERSIONARY INTEREST OF BANKRUPT.

See BANKRUPTCY.

REVOCATION OF GIFT.

See QUALIFICATION.

SATISFACTION OF DEBTS.

See WILL, 15.

SAVINGS OF MARRIED WOMEN.

See CREDITORS.

SEPARATE PROPERTY OF MARRIED WOMEN.

See CREDITORS.

SEPARATE USE.

See HUSBAND AND WIFE, 2.

SEPARATION.

See HUSBAND AND WIFE, 1.

SETTLEMENT.

1. A settlement on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, and, after the death of the survivor, "in trust for and to be released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children as tenants in common in tail; and in default of

issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed, personal property was assigned to the same trustees, upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject to the same powers, provisoes, contingencies, declarations, and agreements as were thereinbefore expressed concerning the payment by the trustees of the rents and profits of the said real estate thereby conveyed, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit :"—*Held*, that this trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate.

This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next of kin; the meaning of such proviso being only, that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next of kin.

There was only one child of the marriage, who died an infant in the lifetime of his father. On the subsequent death of the father :—*Held*, that such child took an absolute interest in the personalty, subject to open and let in other children, if any.

Part of the personal property consisted of a share of real estate under a will, by which it had been devised in trust for sale; and the settlement contained a power for the trustees, with the consent of the husband and wife, and with the concurrence of the persons entitled to the other shares of this property, to elect to take it as real estate, and to hold it upon the trusts of the other real estate contained in the settlement :—*Held*, that this power did not alter the construction of the limitations of the personal estate; but that, when the settled personal estate became the absolute property of the child, the power could no longer be exercised. *Doncaster v. Doncaster*, 26

2. In a settlement, the expression "in case she (the wife) had died intestate and unmarried,"—*held* equivalent to "in case she had died intestate and a widow."

Accordingly, under a limitation, at the wife's death, to the persons who, in the event above mentioned, would have been entitled to her personal estate :—*Held*, her first husband having died without issue, that her children by a second husband, who survived her, were the persons designated.

Dictum on this subject in *Smith v. Smith* (12 Sim. 326, 327), disapproved. *In re Saunders' Trust*, 152

3. Covenant by a father in his son's marriage settlement, by will or otherwise, in his lifetime, to settle 3000*l.*, to be charged upon all real and personal property of which he should at or immediately before his death be seised or possessed, so as, immediately after the decease of the survivor of himself and wife, to become well and effectually vested in the trustees of the settlement, upon

trust for the son's widow and the issue of the marriage:—*Held*, to create a specialty debt, to be proved accordingly in the administration of the father's estate. *Eyre v. Monro*, 305

4. A limitation by settlement of a fund vested in trustees, upon trust, to pay the income to *M.* for life, and at her death "to pay or transfer the capital to all her children (except her eldest or only son) in equal shares at their respective ages of twenty-one years," confers a vested interest on all the children of *M.* who attain twenty-one, although they may die before the period of division.

A younger son attained twenty-one, and then became the eldest by the death of his elder brother before the period of division:—*Held*, that, as there was no reason shown by the settlement for excluding the eldest son, such as his accession to another estate, the share that was vested in the younger son was not divested by his becoming the eldest. *In the Matter of Theed's Settlement; In the Matter of the Trustee Relief Act*, 375

See HUSBAND AND WIFE, 1.

SETTLEMENT, FRAUDULENT.

A settlement, for valuable consideration, made with the intention of defrauding creditors, is void under 13 Eliz. c. 5.

The mere fact of a settlement being voluntary is not sufficient to render it void against creditors; but if the settlor was at the time of making the settlement—not necessarily insolvent—but so largely indebted as to induce the Court to believe that the intention of the settlement was to defraud his cre-

ditors, and some of those debts are still unpaid, the settlement may be set aside.

Quære, whether such a settlement can be treated as void at the suit of subsequent creditors.

A voluntary settlement, by which the settlor gives to the trustees of his property an absolute discretion to apply it in the maintenance and support of himself, his wife, and children, *or any of them*, in such manner as they should think fit, is not fraudulent against subsequent creditors. A fortiori, is such a settlement valid if for valuable consideration.

A., being entitled to a life interest in the dividends of 9000*l.* Consols, and being largely indebted: his brother agreed to pay all debts not charged on *A.*'s life interest, upon condition that such life interest should be settled so as to be applicable for the maintenance of *A.*, his wife, and children, *or any of them*, at the absolute discretion of the trustees. This transaction having been carried into effect:—*Held*, that such settlement was valid against subsequent creditors, and also against a person who was a creditor of *A.* at the time of making the settlement, and whose debt was concealed by *A.* from his brother, and was the only one not paid by him.

During the negotiation which preceded this arrangement, the solicitor of *A.*'s brother wrote to *A.*—"The only object of your brother is to save your life interest, in case anything happens to you, and to effect this, he was willing to pay your debts." And again he wrote to *A.*'s solicitor:—"The income will of course be paid to *A.* as long as this can safely be done; but our conveyancer states that it will be quite impossible to give *A.* any inter-

rest, however slight, without such interest passing to creditors in the case of bankruptcy or insolvency":—*Held*, that these letters did not amount to a secret trust for A.'s benefit; and that, therefore, they could not affect the validity of the settlement.

The discretion of the trustees being absolute:—*Held*, that the Court could not apportion the income between A., his wife, and children, so as to make A.'s part of it available for his creditors.

The settlor having subsequently become insolvent:—*Held*, that his assignee in insolvency might institute a suit to impeach the deed.

A married woman being a party to a suit respecting her separate estate:—*Held*, that her husband must also be made a party, notwithstanding that he was insolvent, and his assignee was a party to the suit.
Holmes v. Penney, 90

SETTLEMENT, VOLUNTARY.

Purchaser for value from the heir not entitled, under 27 Eliz. c. 4, to set aside voluntary conveyance by ancestor. *Burrell's case* (6 Rep. 72), and *Jones (lessee of Moffett) v. Whitaker* (1 Long. & Town. 141), observed on. *Lewis v. Rees*, 132

SHARES.

See WILL, 23.

SHARES, PREFERENCE.

See PREFERENCE SHARES.

SHIP BROKER.

See SHIPPING, 1.

SHIPPING.

1. The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services (as, *semble*, there would be between the services of ship's chandler or ship's carpenter) and his fiduciary character as managing owner.

But before allowing him a commission in respect of the services in question, the Court directed an inquiry, whether, according to the custom of shipowners or otherwise, he, being managing owner, was entitled to any and what commission in respect of duties performed by him, and which duties are ordinarily performed by shipbrokers. *Smith v. Lay*, 105

2. The provisions of the 504th section of "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104), limiting the liability of a shipowner to the value of his ship and freight; and the provisions of the 514th section of the same Act, giving the Court of Chancery jurisdiction to stop actions and suits pending in any other Court in relation to the same subject-matter, are applicable, notwithstanding the circumstance that an adverse claimant has obtained a definitive sentence or judgment of the Court of Admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share rateably with the other claimants in the value of the ship and freight.

But this Court has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, and retaining out

of the proceeds such costs as he may be entitled to retain under the order of the Admiralty Court.

Subject, however, as above mentioned, the shipowner is entitled to an injunction under the 514th section of the Act, restraining the party who has obtained such a judgment from proceeding further in the Court of Admiralty. *Leycester v. Logan*, 446

SOLICITOR AND CLIENT.

The Act 10 & 11 Vict. c. 69, does not deprive this Court of its jurisdiction to order taxation of a solicitor's bill of costs for parliamentary business. To entitle a client to an order for taxation of his solicitor's bill of costs after the expiration of twelve months from its delivery, he must show either pressure, or gross overcharge amounting to what this Court designates as fraud. But it is not necessary to show both.

Taxation of a solicitor's bill for parliamentary business ordered, under the 37th section of the Act 6 & 7 Vict. c. 73, upon a petition presented more than twelve months from the delivery of the bill, on the ground of gross overcharges, amounting to what this Court designates as fraud, coupled with misrepresentation by him in accounting for one of the items overcharged, notwithstanding the client knew of the circumstances, and had another legal adviser, within a month of the delivery of the bill, and might reasonably have availed himself of these circumstances to present his petition within the twelve months.

Dictum of Lord Cranworth, L. J., in *Re Barnard*, 2 D. M. G. 364, explained. In *re Strother (a Solicitor)*, and In *re The Act 6 & 7 Vict. c. 73*, 518

See ADMINISTRATION.

SPECIALTY DEBTS.

See SETTLEMENT, 3.

SPECIFIC PERFORMANCE.

See CONTRACT, 1.

COMPANY INCORPORATED BY ACT OF PARLIAMENT, 2.

STATUTE OF LIMITATIONS.

To prove that a fraud was concealed within the meaning of the 26th section of the Statute of Limitations (3 & 4 W. 4, c. 27), which enacts that the right of a person to recover land, of which he has been deprived by a concealed fraud, shall first accrue at and not before the time at which such fraud should or might with reasonable diligence be discovered, it is not sufficient to show that he was in such an imbecile or uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy, for the Court cannot possibly estimate for this purpose the chance which the state of mind and education of a man may afford of his making such discovery, and is, therefore, compelled to assume that every one not actually a lunatic is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary.

Therefore, a suit cannot be maintained to set aside a compromise of an action to recover large estates, made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect, that, though cognisant of all the facts, it was necessarily a concealed fraud as to him.

Any man who is not a lunatic must be considered competent to agree to a compromise of litigation in which he is engaged; the circumstances under which the compromise was made not being such as to afford evidence of fraud. *Manby v. Bewicke*, 342

STATUTES OF DISTRIBUTION.

See SETTLEMENT, 2.
WILL, 21.

STATUTES, SPECIAL CONSTRUCTION OF.

Whenever the Legislature has, by a special Act, conferred powers upon a corporation or body of commissioners, for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule the powers given by the former Act.

A railway company were empowered by their special Act to widen a branch of their railway passing through *London*, and to build additional stations. In conformity with the powers so given, they proceeded to erect a station on their land by the side of a highway, within the distance required to be left between buildings and highways in *London*, by the Metropolis Local Management Act, which had passed shortly after the special Act of the company:—*Held*, that the powers conferred on the company by their special Act were not controlled by the later statute, and that the company were authorised so to build their station.

By a statute passed prior to the Railway Act, the trustees of the particular highway had power to

prevent any building being erected so near to the road as the station was being built. The Metropolis Local Management Act repealed this statute, and vested this authority in the managing body thereby constituted:—*Held*, that the trustees of the road must be taken to have been present at the passing of the Railway Act, as well as of the Metropolis Act, and, therefore, the powers given by the Railway Act must prevail. *The London and Blackwall Railway Company v. The Board of Works for the Limehouse District*, 123

STAT. 13 ELIZ. c. 5.

See CREDITORS, 1.
SETTLEMENT, FRAUDULENT, 1.

STAT. 27 ELIZ. c. 4.

See SETTLEMENT, VOLUNTARY, 1.

STAT. 9, GEO. 2, c. 36.

See CHARITY.
WILL, 21.

STAT. 3 & 4 WILL. 4, c. 27, s. 6.

See STATUTE OF LIMITATIONS.

STAT. 3 & 4 WILL. 4, c. 104.

See WILL, 14.

STAT. 4 & 5 WILL. 4, c. 22.

See APPORTIONMENT.

STAT. 1 & 2 VICT. c. 42.

See FOREST OF DEAN.

STAT. 1 & 2 VICT. c. 110.

See CREDITORS, 1.

STAT. 5 & 6 VICT. c. 45, ss. 23,
AND 26.

See COPYRIGHT, 2.

STAT. 6 & 7 VICT. c. 73, s. 37.

See SOLICITOR AND CLIENT.

STAT. 8 VICT. c. 16, s. 97.

See COMPANY INCORPORATED BY ACT
OF PARLIAMENT, 2.

STAT. 8 VICT. c. 18, ss. 76, 77, 79.

See LANDS CLAUSES CONSOLIDATION
ACT, 1.

ID. s. 79.

See PRACTICE, 3.

STAT. 10 & 11 VICT. c. 69.

See SOLICITOR AND CLIENT.

STAT. 10 & 11 VICT. c. 96.

See TRUSTEES, 1.

STAT. 13 & 14 VICT. c. 60,
ss. 2, 15.

In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be repaid by a given day, for the borrower, his heirs or assigns; but, in case default should be made, then upon trusts for sale; and the trusts of the purchase money were declared to be for payment of the principal money, interest, and costs, and subject thereto for the borrower, "his executors, administrators, or assigns." Default having been made—*Held*, that the trust of the surplus being for the

borrower, "his executors, administrators, or assigns," and not for him, "his heirs or assigns," the deed operated to convert the property as between his real and personal representatives. It was, therefore, more than "merely a security for money"—more, that is, than a "mortgage" as defined by the 2nd section of the Trustee Act, 1850 (13 & 14 Vict. c. 60): it was a deed of "trust" within the meaning of the 15th section of the Act; and the lender having died intestate, and it being impossible to find his heir, the Court had power to make a vesting order under that section. *In re Underwood*, 745

STAT. 15 & 16 VICT. c. 86, s. 54.

See TRUSTEES, 3.

STAT. 17 & 18 VICT. c. 104,
ss. 504, 514.

See SHIPPING, 2.

STAT. 17 & 18 VICT. c. 125.

See ARBITRATION.
JURISDICTION, 3.

STAT. 19 & 20 VICT. c. 47, s. 25.

See COMPANY, JOINT STOCK.

STOCK.

1. Where an intestate had executed transfers of railway shares and stock to a fictitious person, the Court, on a bill filed by his administrator, declared that the intestate used the fictitious name as another designation of himself, and that the Plaintiff, as his administrator, was entitled to transfer the shares and stock, and to receive the dividends thereof. *Arthur v. The Midland*

Railway Company; Arthur v. The London and North Western Railway Company, 204

2. An assignment of 2,000*l.* South Sea Stock, part of a sum of 12,200*l.* like stock, to which the assignor was entitled in reversion upon the death of his mother, and all his right, title, and interest therein:—*Held*, to pass all bonuses which accrued during his mother's life subsequently to the assignment. *In the Matter of the Trustees Relief Act; and in the Matter of the Trusts of the Will of James Armstrong, deceased,* 486

STOCK, INVESTMENT IN, VOID AGAINST CREDITORS.

See CREDITORS, 1.

SUIT, CREDITORS.

See ADMINISTRATION.

SUITORS' FEE FUND.

See ANSWER, 1.

"SUMS OF MONEY"

Held to comprise personal estate generally.—*See* WILL, 23.

SURETY AND PRINCIPAL.

See PRINCIPAL AND SURETY, 1.

SURRENDER OF COPYHOLDS BY ATTORNEY.

See COPYHOLDS.

SURVIVING TRUSTEE, DEVISE BY, OF TRUST ESTATES.

See TRUSTEES, 6.

TRANSFER.

TAXATION OF BILL OF COSTS, UNDER 6 & 7 VICT. c. 73, s. 37.

See SOLICITOR AND CLIENT.

TITLE.

See VENDOR AND PURCHASER.

TITLE DEEDS, POSSESSION OF.

See ADMINISTRATION.
MORTGAGE, 2.

TRADE MARK.

There is no property in a trade mark; but a person who has been in the habit of using a particular mark, may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury.

A foreign manufacturer has a remedy by suit in this country for an injunction and account of profits against a manufacturer here, who has committed a fraud upon him by using his trade mark, for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner.

This relief is founded upon the personal injury caused to the Plaintiff by the Defendant's fraud, and exists, although the Plaintiff resides and carries on his business in another country, and has no establishment here, and does not even sell his goods in this country. *The Collins Company v. Brown; Same Company v. Cohen,* 423, 428

TRANSFER.

See STOCK, 1.

TRUST.

"TRUST,"

Meaning of, in the Trustee Act, 1850.—*See* STAT. 13 & 14 VICT. c. 60.

TRUST, RESULTING.

See QUALIFICATION.

TRUST, WHETHER PROPERTY IMPRESSED WITH ANY.

See HUSBAND AND WIFE, 2.

TRUSTEE ACT, 1850.

See STAT. 13 & 14 VICT. c. 60.

TRUSTEE RELIEF ACT.

See COSTS, 4.

INFANTS.

TRUSTEES, 5.

TRUSTEES.

1. Trustees, who had paid into Court, under the Act 10 & 11 Vict. c. 96, an alleged balance, the title to which they believed undisputed,—the party they believed entitled having previously demanded payment, and offered a discharge pro tanto :—*Held* not entitled to costs upon a petition for payment of the fund out of Court. *In re the Trusts of Demster Heming's Deed : and of the Act 10 & 11 Vict. c. 96,* 40

2. Certain real estates, subject to incumbrances, the interest of which more than exhausted the rents, were conveyed by the mortgagor to trustees, upon trust for his creditors. After the execution of this creditors' deed, one of the trustees thereof was employed by the mortgagees as their

TRUSTEES.

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agent, to collect the rents :—*Held*, that he could not be allowed any commission out of the rents. *Nicholson v. Tutin (No. 2),* 159

3. Lord *Eldon's* rule, that, in order to obtain an inquiry as to wilful neglect and default against an executor or a trustee, the Plaintiff must allege and prove at least one act of wilful neglect or default, is still the rule of this Court, and was not intended to be relaxed by *Coope v. Carter* (2 De G. M'N. & G. 297, 298.)

Dicta in that case, from which the contrary has been inferred, explained.

Shortly after a testator's death, in 1825, an inventory and appraisement was made by his executors, or one of them, of all and singular the goods and chattels, rights, and credits of the testator, showing that the same were of the value of £28,665 odd. Upon bill filed in 1856 for an account, and for an inquiry as to wilful neglect and default, in case the estimated amount had not been realised, the Defendants failed, as to a large portion of the estimated amount, to show that it had been realised :—*Held*, nevertheless, that the Plaintiff was not entitled, at the hearing, either to an inquiry expressly directed to wilful neglect or default, or even to a preliminary order of the kind indicated in *Coope v. Carter*, viz., an inquiry short of wilful neglect and default, but upon which a new order, expressly so directed, might be founded at a future stage : the Court being of opinion, first, that upon the pleadings, the fact of wilful neglect and default could not be treated as in issue between the parties ; and, secondly, that, even if it could be so treated, there was no evidence upon it.

Accounts, recorded in the Court of Chancery in *Jamaica* in a suit instituted against executors who had

proved testator's will in that island, ordered, in a suit against them in *England*, to be taken, under 15 & 16 Vict. c. 86, s. 54, as *prima facie* evidence of the truth of the matters therein contained; with liberty to the Plaintiff to surcharge and falsify. *Sleight v. Lawson*, 292

4. Lands devised to three trustees, upon trust for sale, were sold, and the purchase-money paid to one of them, who was a solicitor, and acted in the matter of the sale as solicitor for himself and the other trustees.

The money having been retained by him and lost:—*Held*, after his decease, that it must be taken to have been received by him not in his capacity of solicitor, it being no part of his duty in that capacity to receive it, but in his capacity of trustee; and that the survivor of the three could not, upon a common decree for an account, be held liable for its loss. *In re Fryer; Martindale v. Picquot*, 317

5. Trustees who have paid a fund into court under the Trustee Relief Act, cannot prevent its being paid out to the cestui que trust absolutely entitled to it, on the ground that he is about to file a bill against them to take the accounts of the trust.

Trustees have a right to some sort of discharge from their cestuis que trust, not, perhaps, a release, unless the instrument creating the trust was under seal; and trustees, between whom and their several cestuis que trust disputes have arisen as to the amounts actually due to them respectively, are justified in paying into court, to the separate account of each cestui que trust, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds. *In the matter of*

VENDOR & PURCHASER.

the Trusts of the Will of Mary Wright; and in the Matter of the Trustee Relief Act, 419

6. Devise upon trust that the trustees and the survivors and survivor of them, his heirs and assigns, should, at such time as they should think most advisable, sell, and give receipts, which should be good discharges; with a power for the trustees or the survivor to appoint new trustees, in the usual form. The surviving trustee devised his trust estates:—*Held*, that his devisees could make a good title; and *semble* the word "assigns" would have been sufficient for this purpose, without the power to appoint new trustees. *Hall v. May*, 585

See FOREST OF DEAN.

FRAUD, 1.

SHIPPING, 1.

WILL, 18, 19.

TRUSTEES, COSTS OF.

See COSTS, 4.

TRUST FOR CHILDREN.

See CREDITORS, 1.

UNCERTAINTY.

See WILL, 21.

"UNMARRIED," CONSTRUCTION OF.

See SETTLEMENT, 2.

VENDOR AND PURCHASER.

1. A purchaser of real property, the title to which is derived under a

will, is not entitled to have the will established, nor to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will. *M'Culloch v. Gregory*, 12

2. A person having under a will a right of pre-emption of an estate for a given sum, provided he signified to the trustees within one month of the testator's death his option to purchase, and paid the purchase-money within a further period of two months, duly signified his option to the trustees, and applied to their solicitor for an abstract of title. The solicitor acknowledged this application, and promised to take an early opportunity of seeing his clients thereon. But no abstract was furnished; and, hearing nothing further, the donee of the right of pre-emption allowed the two months to expire without paying his purchase-money, or taking any further step in the matter.

Held, that, under the circumstances, and according to the true construction of the will, the trustees were not under any obligation to furnish an abstract; and the purchase-money not having been paid within the two months, the right of pre-emption was lost, the rule being that such a right must be strictly complied with.

Seemle, that, even if the trustees had been under any such obligation, still the donee of the right, having allowed the stipulated period to expire without taking any further step, could not, as against the parties beneficially interested in the proceeds of the sale, insist on the trustees' laches as giving him a right to an extension of time for completing his purchase.

But *seemle*, that, had there been fraud on the part of the trustees, or

possibly such laches on their part as the Court could consider to have been the sole cause of the donee of the right of pre-emption not complying modo et forma with the conditions imposed by the will, the latter might have been entitled to relief. *Brooke v. Garrod*, 608

See COMPANY INCORPORATED BY ACT OF PARLIAMENT, 2.
LANDS CLAUSES CONSOLIDATION ACT, 1.
TRUSTEES, 6.

VESTED INTEREST.

See WILL, 22.

VESTING.

See SETTLEMENT, 4.
WILL, 12.

VESTING ORDER.

See STAT. 13 & 14 VICT. c. 60.

VOLUNTARY SETTLEMENT.

See SETTLEMENT, VOLUNTARY.

WARD OF COURT.

See INFANT.

"WHICH" FOR "AS."

See WILL, 23.

WILFUL NEGLIGENCE AND DEFAULT.

See TRUSTEES, 3.

WILL.

1. A direction in a will for trustees to apply the whole, or so much as they should think necessary, of the income of property, until the period of distribution, towards the maintenance, education, and advancement of testator's grandchildren *per stirpes*:—*Held*, not to afford ground for presuming that he intended a division *per stirpes* of the capital. *Nockolds v. Locke*, 6

2. Devise, in 1826, of real estate to trustees, in fee, upon trust for one for life, and then for his first and other sons successively, in tail, with a direction to the trustees, during the minority of any cestui que trust, to receive the rents and invest and accumulate the same, and to hold such accumulations upon the same trusts as were declared concerning the real estates:—*Held*, that the trust for accumulation was void.—*Turvin v. Newcome*, 16

3. A devise of land to trustees in fee, upon trust to pay the rents to the testator's daughter for life, and after her death to apply them in the maintenance of all and every her child and children, during their minority, and when and as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell, and to pay the proceeds of such sale "to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child."—*Held*, that one of several children who survived the testator, having died under twenty-one, took no share. *Lloyd v. Lloyd*, 20

4. Bequest to J. D. (a younger son of A. D.) as soon as he should attain twenty-one, but, in case he should die before attaining twenty-one, then

to such of the other children of A. D. as should attain twenty-one. J. D. died an infant:—*Held*, that the words "such &c. as should attain twenty-one," were equivalent to "at twenty-one," or "when and as they should attain twenty-one;" and that on J. D.'s death the share of a child who had then attained twenty-one became immediately payable, and no after-born child (if any) would be entitled to a share in the fund.—*Gillman v. Daunt*, 48

5. An indefinite devise of real estate by a will made before 1838 is enlarged into a fee simple by annexing a direction, that the devisees should pay a sum of money to another person, or by a declaration that the devise is "subject to his making" such payment, or by any other expression in the will showing that the payment is to be made by the devisee out of the interest devised to him; because, if such interest were for life only, it might determine before it enabled him to make such payment.

But an indefinite devise before 1838, of real estate to A., "after" or "subject to the payment out of the said premises" of a sum of money to another person, has not this effect; because the sum is then charged upon the whole fee simple, and nothing is given to A. until that charge is satisfied, and, consequently, no implication can be derived from the charge of an intention to enlarge A.'s estate. *Burton v. Powers*, 170

6. Leaseholds, specifically bequeathed to married women successively for life, for their separate use, with remainder to infants, proved *damnosa hæreditas*. The Court decreed a sale notwithstanding the executors had so far assented to the bequest as to put the first tenant for life into possession.

And the second tenant for life, who had declined the property in specie, was *held*, nevertheless, entitled to a life interest in the proceeds of the sale, and that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession. *Earl of Lonsdale v. The Countess of Berchtholdt*, 185

7. Where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved *modo et formâ* as intended by the testator, still if there is a clear intention on the part of the testator, that the benefit should be conferred—if the testator has excepted from the general property bequeathed to the residuary legatee, the property the subject of the specific bequest, for the benefit of the specific legatee, the latter is entitled to the benefit of the bequest, and to enjoy it in any manner he may think fit.

And where the purpose for which one of two bequests, given by will to the same parties, is expressed in the will to be for the better enjoying of the other, the mere circumstance that the legatees cannot enjoy the latter shall not deprive them of the benefit of the former.

Therefore, where the interest of a fund was directed to be laid out in payment of the rent and charges of leaseholds specifically bequeathed, and the leaseholds proved *damnosa hæreditas*, and could not be specifically enjoyed, and were therefore sold by order of the Court:—*Held*, that the legatees were entitled, not only to the proceeds of the sale, but also to the interest of the fund set apart for the better enjoyment of the leaseholds in specie. *Ibid*.

8. The principle of the decisions in reference to the question whether a charge on real estate is effected by

reason of a residuary devise, is the same in the case of legacies as in that of debts, and is this, that where residuary real and personal property is given in one mixed fund to the executor, who is to pay debts and legacies, there legacies as well as debts are charged upon the real estate.

Testator, after bequeathing a legacy, and expressly charging part of his real estate with an annuity to the legatee, devised and bequeathed all the rest, residue, and remainder of all and singular his real and personal estate (subject to his debts, funeral and testamentary expenses) to trustees, whom he also appointed executors, upon certain trusts:—*Held*, following *Francis v. Clemow* (Kay, 435), that the legacy was well charged upon the real estate.

Arrears of an annuity charged on a reversionary interest in land:—*Held* recoverable more than six years after the same became payable, the statute 3 & 4 Will. 4, c. 27, s. 42, having no application so long as the interest is reversionary.

Power by sale or mortgage to raise money for maintenance implied from an unfinished clause in a will, purporting to provide for the event of a deficiency of funds for that purpose. *Wheeler v. Howell*, 198

9. The Court may supply words in a will where the context shews, by a necessary implication, what are the words omitted, and unless they are supplied there would be an intestacy.

So, where there is a gift by will, and then a gift over not commensurate with the original gift, the Court will curtail the general words of the gift over, by supplying words of reference; as where the first gift is to *A.*'s children, and the gift over is in default of issue of *A.*, the Court

will read the gift over as though it were in default of "such" issue.

But where there was a devise of a particular property to the testator's daughter *A.*, her heirs and assigns, and if she should die under the age of twenty-five years "without having left any child or children," over; and, subsequently, a devise of other real estate to trustees in fee, in trust for *A.* for her separate use; and after her death, in trust to convey the same "unto and equally amongst such children of *A.* as tenants in common, the rents and profits in the meantime to be applied to their maintenance; and in case *A.* should die without leaving any child or children, or, leaving such child or children, all should die under twenty-one," over:—*Held*, that the Court could not, after "such children of *A.*," supply the words "as should attain twenty-one," but was at liberty as against the testator's heir to construe the word "such" as relating to all the children of *A.*, as they had been mentioned in the previous limitation. *Hope v. Potter*, 206

10. A testatrix having given legacies to several persons by name, describing each as her niece, bequeathed her residuary personal property upon trust for her respective "nephews and nieces," in equal shares. Two of the legatees in the will called nieces, were nieces not of the testatrix, but of her late husband:—*Held*, that the circumstance that the testatrix had, in her will, called these two her nieces, did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest, so as to make it include all the nephews and nieces of her husband living at her death, nor even to include the two legatees whom she had called her nieces in the will. *Smith v. Lidiard*, 252

11. Powers of or trusts for sale, created by will over real estate, are not (as leasing powers have been held), inconsistent with a widow's right to dower.

Nor is her claim affected by any direction as to the distribution of the proceeds.

There is no such rule, as that, where a testator's widow is entitled under his will to what would exceed her dower, she is, thereby, put to her election.

Where a testator, by his will, directed his trustees to sell "all his freehold and copyhold estates wheresoever situate," and gave his widow half of the proceeds, and also half of all his personal property (except certain articles specifically bequeathed to her):—*Held*, that she was not bound to elect between her dower and the benefits given her by the will.

The authorities on this subject examined, and observations on *Chalmers v. Storil* (2 V. & B. 222), which is imperfectly reported. *Bending v. Bending*, 257

12. The use of such words as "pay and transfer" as the only words of gift in a deferred bequest, does not make such bequest contingent; the true criterion is, what was the reason for the postponement. If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent.

A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters *A.* and *B.* for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's

children, and the issue, if any, of A. and B., and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living (A. and B. excepted) would have been entitled to. A. and B. died without leaving issue.

Held, 1. That the bequest in remainder vested at the testator's death. 2. That the whole fund belonged to the testator's children other than A. and B., and to the children living at the death of such as had died leaving children. 3. That the shares of such as had died without leaving children belonged to their representatives.—*In the matter of the Trustee Relief Act; in the matter of the Trust of the Will of Nicholas Bennett*, 280

13. A testator, by a codicil, after reciting that a person to whom he had by his will given a legacy of £2,000 had emigrated to *Australia*, proceeded therefore to revoke such legacy, and in lieu thereof gave to the same legatee in case he remained in *Australia* or out of this kingdom £600 after the death of the testator's wife, "but if he return to *England* before her decease" the testator gave him the further sum of £400. *Held*, that the return of the legatee to *England* was a condition precedent, and was not satisfied by his embarkation on board a *British* ship to return to *England*, the ship and passengers being lost on the voyage. *Priestley v. Holgate*, 286

14. The Act 3 & 4 Will. 4, c. 104, has not affected the law as to the marshalling of assets in favour of pecuniary legatees against devisees of real estate charged with, or devised subject to, the testator's debts. The question now, as before the Act,

is one simply of intention on the whole of the will; and a mere charge of debts upon the real estate, or a mere devise of the real estate, subject to testator's debts, without any trust, is sufficient, in the event of the personal estate proving inadequate to pay both debts and legacies, to entitle the legatees to come upon the real estate so far as the personality has been applied in payment of debts. *Richard v. Barrett*, 289

15. Although a direction in a will to pay *debts and legacies* is sufficient to rebut the presumption that a legacy was intended in satisfaction of a debt, a direction to pay *debts* (without more) is not sufficient for that purpose.

Nor will that presumption be rebutted by the circumstance that the debt was liable to variation in amount, *e. g.* where it was in respect of deposits made with testator, the creditor drawing on him from time to time in respect of such deposits; nor by the circumstance, that by reason of the creditor (a lady) marrying before the date of the legacy, the debt became payable to her husband, unless the legacy be to her separate use, or large enough to be subject to her equity to a settlement. *Edmunds v. Low*, 318

16. Bequest to two persons "in two equal parts, each for his and her sole use and benefit, and to be disposed of as each of them pleases, at their death, or if not so disposed of, to be equally divided at their deaths between their children." *Held*, an absolute gift of the principal. *In re Mortlock's Trust*, 456

17. A direction in a will, that an equitable life interest in real estate thereby devised shall cease and determine if the devisee should attempt

to alienate it, is valid, whether there be a gift over of his interest on that event or not. *Joel v. Mills; Harvey v. Mills*, 458

18. A testator empowered and directed the trustees of his real estate to raise by mortgage thereof any sum not exceeding 20,000*l.*, and to apply the same in paying such of the creditors of M. as they should think fit. The trustees raised 6,000*l.*, and in their answer to a bill by a judgment creditor of M. to enforce his lien, they stated that they had raised this sum, but had not further exercised their power, and refused to do so except under the direction of the Court. They then filed a bill to have the trusts carried into execution by the Court; and to this bill they made the judgment creditor a party, and stated in it that they intended to raise the whole 20,000*l.* *Held*, that the judgment creditor had an equity to sue to have the fund raised secured, if not to have the whole 20,000*l.* raised and distributed; and that the trustees were bound, if not by the will, by their answer and the statement in their bill, to raise the whole 20,000*l.* Whether they had not given up their power of selection among the creditors—*Quære. Ibid.*

19. Devise and bequest of real and personal estate to trustees, upon trust, yearly and every year during the life of J. S. (who was imbecile and not competent to manage his own affairs), to pay and apply *the whole or any part* of the rents, issues, and profits, *for and towards his maintenance, attendance, and comfort*:

Semble, a trust which this Court would have enforced during the life of J. S., upon a case made that a sufficient part of the rents, issues, and profits was not applied for his main-

tenance, attendance, and comfort; and the trustees could not have insisted on their discretionary power as ousting the jurisdiction of the Court. But it would not have conferred on J. S. an absolute right to have the whole income so applied, except in the event of a case being made that the whole was wanted for the specific purposes directed by the will.

Semble, also, that the trust was in exoneration of the private property of J. S.; and had that property been to any extent applied towards his maintenance, attendance, and comfort, his personal representatives would have been entitled to have it recouped to that extent out of the income of the trust property.

But, it appearing that no part of his private property had been so applied, and that all that was necessary for his maintenance, attendance, and comfort, up to his death, had been supplied out of the income of the trust property,—*Held*, that the trust for his benefit was discharged, and that the surplus income of the personal property passed to the residuary legatees, and the surplus rents of the real estate (there being no devise of the surplus rents accruing during the life of J. S.) to the testator's heir at law.

Distinction between a gift, like the above, of "the whole or *any part*," and a gift of an entire fund, or the entire interest of a fund, for a particular purpose assigned: in the latter, although the purpose fails, the Court holds the donee entitled to the entire fund or interest (as the case may be), treating the purpose merely as the motive of the gift.

Distinction also between such a gift and that in *Cope v. Wilmot*, (1 Coll. 396), where the object was so large as, under the circumstances, to

entitle the donee to the whole. *In re Sanderson's Trust*, 497

20. Where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant and void. *Barton v. Barton*, 512

21. Bequest of a fund to be at the disposal of testator's widow by her will, therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of O. as she may prefer, and under such restrictions as she may prescribe, and the remainder to be at her disposal among testator's relatives as she may direct. *Held*,

First — That whatever might be the effect of a bequest "for the foundation of a charity school," a bequest "for the foundation of a charitable endowment" was a lawful bequest, and not void under the stat. 9 Geo. 2, c. 36.

Secondly — That the words "to apply" and "to be at her disposal" were clearly sufficient to create a trust.

Thirdly — That although the fund was to be applied "as to a part" (without saying what part) for one set of objects, and as to "the remainder" for another, and the widow died without exercising her power of determining the proportions in which each were to take, the bequest was not void for uncertainty, but the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes, and the other to the testator's relatives.

Fourthly — That, although the widow might have exercised her power in such a manner as to include more distant relatives, still, as

she had died without so exercising it, none could take as "relatives" but such as were capable of taking within the Statutes of Distribution. *Salisbury v. Denton*, 529

22. Bequest upon trust to pay and divide equally to and amongst all the children of testator's daughter when the youngest should attain 21, followed by a gift over in case of the death of his daughter "without leaving any child or children:"—*Held*, the youngest child having attained 21, that the fund was divisible equally amongst all the children, and that such interests were not defeasible in the event of the death of the testator's daughter without leaving any child or children.

In such a case, the gift over being contradictory if the word "leaving" be construed literally, that word will be read as equivalent to "having." *Kennedy v. Sedgwick*, 540

23. Direction in a will, that "all and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting," should be brought into hotchpot:—*Held*, that a subsequent unattested statement in testator's handwriting was admissible in evidence of advances; the Court construing "which" as meaning "as," and the clause "as will appear," &c., as mere words of reference, forming no part of the identification of the subject.

But such unattested document cannot be looked upon as proving that an advance was made which was not actually made, nor conversely; and a direction therein, that shares so advanced, and which had become depreciated in value, should be estimated at their selling price at the

time when the estate should be divided, is inadmissible.

"Sums of money" in a will held to comprise personal estate generally.
Whateley v. Spooner, 542

24. A devise before 1838 of "all my estates in the occupation of A. in the parish of B. to C." without words of limitation, conferred upon

YOUNGER CHILDREN.

C. the fee simple. *White v. Coram* 652

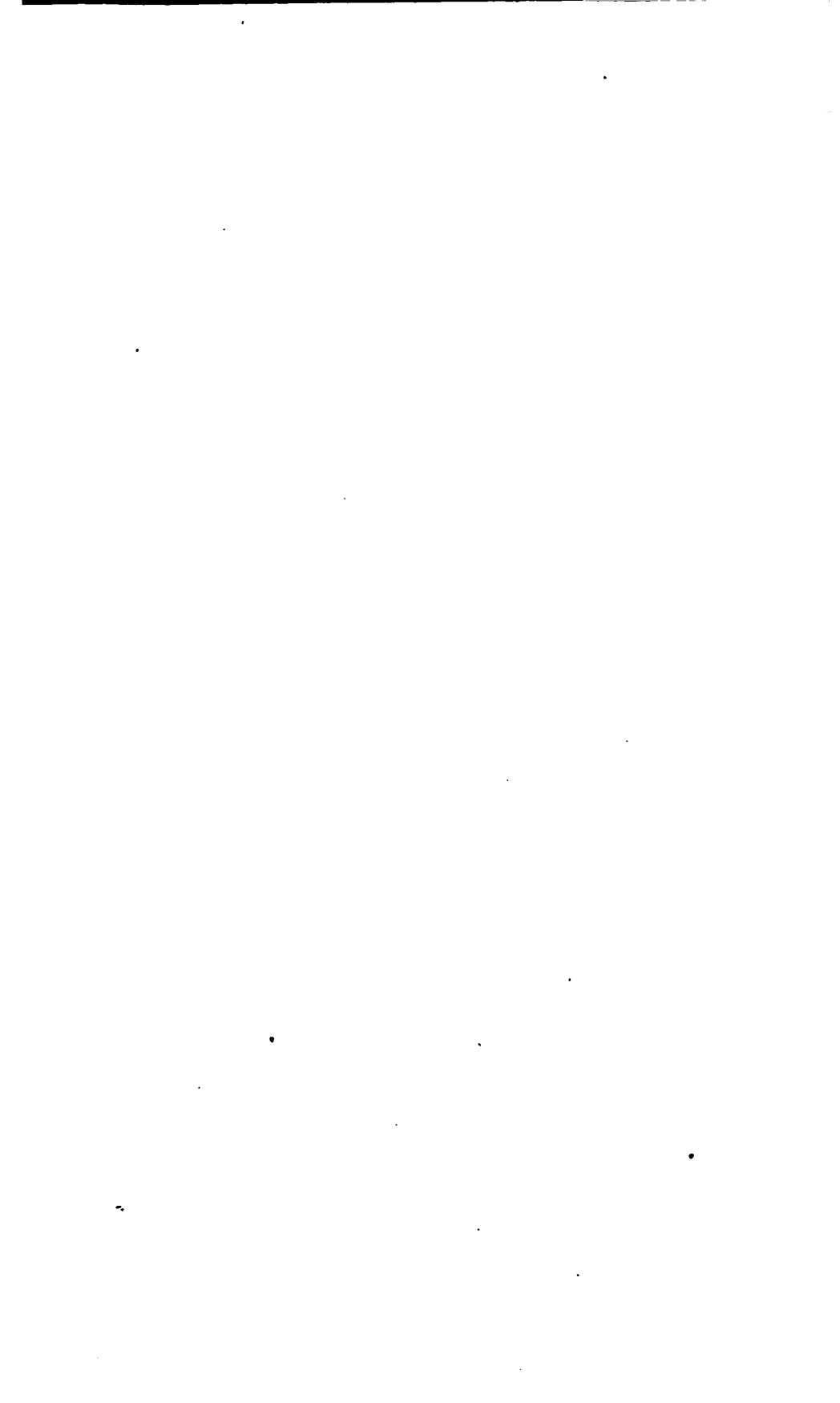
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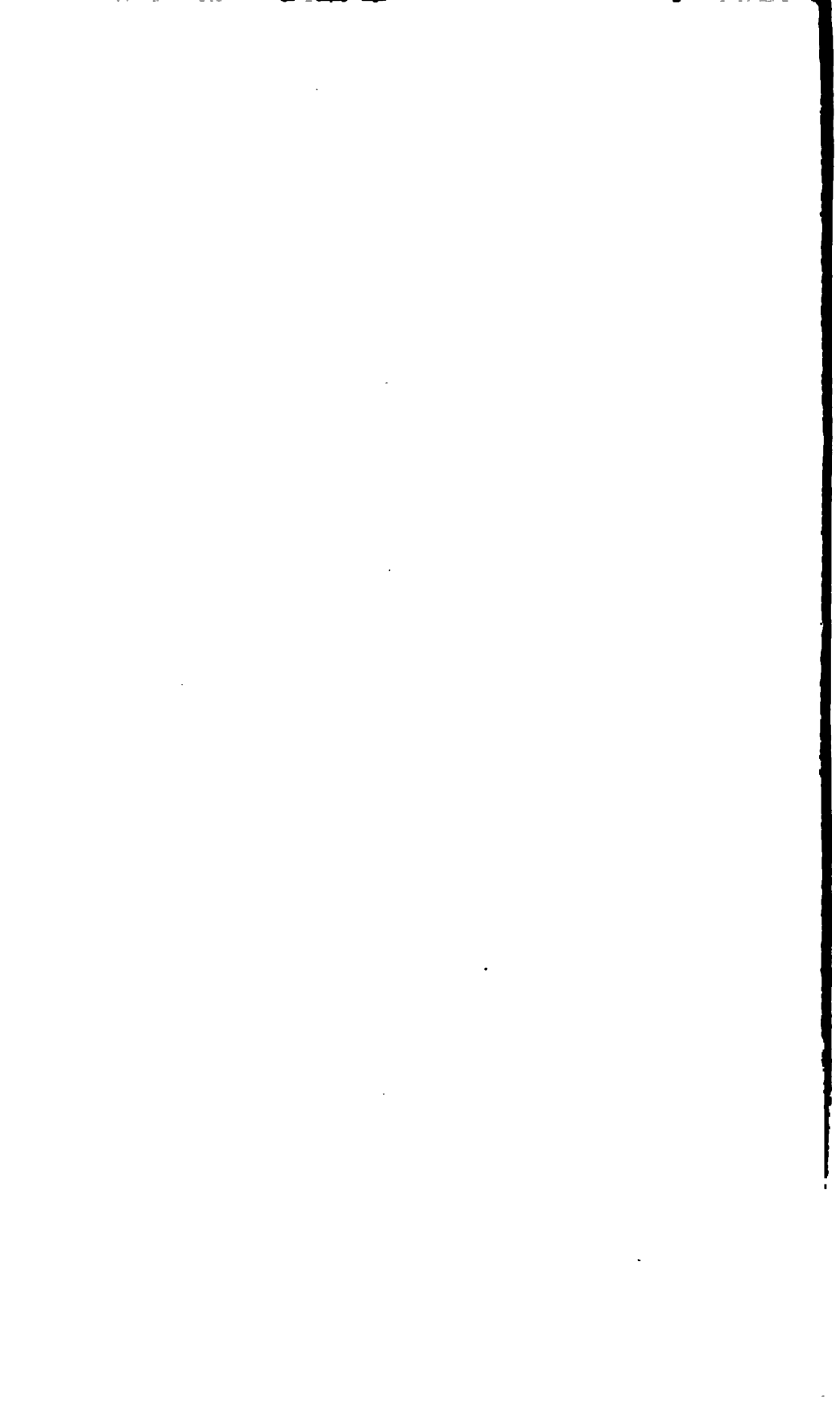
JURISDICTION, 1.

VENDOR AND PURCHASER, 1, 2.

YOUNGER CHILDREN.

See SETTLEMENT, 4.





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